TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1915

No. [redacted]358

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

AMY L. WINFIELD.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED JANUARY 20, 1916.

(26,094)

(25,094)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 811.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

AMY L. WINFIELD.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

INDEX.

	Original.	Print
Caption	*a*	1
Proceedings in the supreme court	1	1
Notice of appeal	1	1
Grounds of appeal	2	2
Writ of certiorari	5	4
Allocatur	7	4
Return	7	4
Transcript of record from the common pleas court of Hudson county	8	5
Petition	8	5
Order fixing day	11	7
Answer	12	7
Order of continuance	14	8
Determination and rule for judgment	15	9
Trial	19	11
Testimony of Amy L. Winfield	20	12
Colloquy of court and counsel	21	12

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	Original.	Print
Certificate to evidence	23	13
Reasons for reversal, etc.	24	14
Opinion of supreme court *per curiam*	26	15
Rule of reversal in supreme court	28	16
Check list	29	17
Opinion, Gummere, C. J.	30	17
Judgment	35	20
Petition for writ of error	36	21
Order allowing writ of error	41	23
Bond on writ of error	43	23
Certificate of lodgment of bond	47	25
Writ of error	48	26
Certificate of lodgment of writ of error	51	26
Assignments of error	52	27
Citation and service	56	28
Clerk's return to writ of error	58	29

a New Jersey Court of Errors and Appeals.

AMY L. WINFIELD, Petitioner-Defendant-Appellant,
vs.
ERIE RAILROAD COMPANY, a Corporation, Defendant-Prosecutor-Appellee.

On Certiorari. On Appeal from Supreme Court.

State of the Case.

ZIEGENER & LANE,
Attorneys of Petitioner-Defendant-Appellant.
COLLINS & CORBIN,
Attorneys of Defendant-Prosecutor-Appellee.

1 *Notice of Appeal.*

Filed September 3, 1915.

New Jersey Supreme Court.

In the Matter of the Application of AMY L. WINFIELD for Compensation, etc., upon the Death of Her Husband, David R. Winfield, Petitioner-Defendant-Appellant,
vs.
ERIE RAILROAD COMPANY, a Corporation, Defendant-Prosecutor-Appellee.

On Petition. On Certiorari.

Notice of Appeal from the New Jersey Supreme Court to the Court of Errors and Appeals of New Jersey.

To Collins & Corbin, Esqs., Attorneys for Deft.-Pros., Appellee.

SIRS: Take notice that the petitioner-defendant, appellant, appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause.

Yours, etc.

ZIEGENER & LANE,
Attorneys for Petitioner-Defendant-Appellant.

HARRY LANE,
Of Counsel.

Dated, August 31st, 1915.

Service duly acknowledged.

2 *Grounds of Appeal.*

(Filed Sept. 21, 1915.)

New Jersey Court of Errors and Appeals.

In the Matter of the Application of AMY L. WINFIELD for Compensation, etc., upon the Death of Her Husband, David R. Winfield, Petitioner-Defendant-Appellant,

vs.

ERIE RAILROAD COMPANY, a Corporation, Defendant-Prosecutor-Appellee.

On Appeal from New Jersey Supreme Court.

To Collins & Corbin, Esqs., Attorneys for Appellee.

SIRS: Take notice that the following are the grounds of appeal from the whole of the judgment entered in this cause, which the appellant hereby assigns and upon which he will rely:

1. Because the New Jersey Supreme Court erroneously reversed the judgment of the Hudson County Court of Common Pleas in this cause.

2. Because the New Jersey Supreme Court erroneously refused to sustain and affirm the judgment of the Hudson County Court of Common Pleas in this cause.

3. Because the New Jersey Supreme Court erroneously held
3 that the cause of action herein was exclusively governed by the Federal Employers' Liability Act of 1908, 35 Stat. 65, c. 149, to the exclusion of the statutes of the State of New Jersey and particularly the New Jersey Workmen's Compensation Act, Chapter 95, Laws 1911, and the amendments thereof and supplements thereto, whereas a proper and correct construction of the said Federal Employers' Liability Act of 1908, 35 Stat. 65, c. 149 would indicate and determine that such cause of action herein was not exclusively governed by the said Federal Employers' Liability Act of 1908, 35 Stat. 65, c. 149.

4. Because the New Jersey Supreme Court erroneously held that the cause of action herein was not governed by Chapter 95 of the Session Laws of New Jersey of 1911, being "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," and supplements thereto and the amendments thereof and that no recovery could be had thereunder for the reason that it was within the Federal Employers' Liability Act of 1908, 35 Stat. 65, c. 149, which exclusively controlled such cause of action herein.

5. Because the New Jersey Supreme Court erroneously held that the petitioner-appellant was not entitled to compensation under the

New Jersey Workmen's Compensation Act, Chapter 95, Laws 1911, and the amendments thereof and supplements thereto.

6. Because David R. Winfield at the time of the accident, which resulted in his death, was not employed by the defendant-appellee, Erie Railroad Company, in interstate commerce.

4 7. Because the judgment of the New Jersey Supreme Court was contrary to law, erroneous and defective.

8. Because the New Jersey Supreme Court misconstrued and misinterpreted the laws of the United States.

9. Because the New Jersey Supreme Court in construing the Act of Congress of the United States, known as the "Employers' Liability Act of 1908," 35 Stat. 65, c. 149, erroneously held that the cause of action herein was exclusively governed by the said Act of Congress to the exclusion of the statutes of the State of New Jersey and particularly the New Jersey Workmen's Compensation Act of 1911, Chapter 95, P. L. 1911, and the supplements thereto and amendments thereof.

10. Because the New Jersey Supreme Court by its judgment violated the Constitution of the United States.

11. Because the New Jersey Supreme Court decided contrary to the provisions of Section 2 of Article 6 of the Constitution of the United States, to wit:

"The Constitution and the laws of the United States, which shall be made in pursuance thereof shall be the Supreme Law of the land and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

12. Because the New Jersey Supreme Court by its judgment deprived the petitioner-appellant of her property without due process of law in violation of the Constitution of the United States.

5 13. Because the New Jersey Supreme Court by its judgment denied the petitioner-appellant the equal protection of the laws, contrary to the Constitution of the United States.

14. Because the New Jersey Supreme Court by its judgment abridged the privileges and immunities of the petitioner-appellant contrary to the constitution of the United States.

15. Because the New Jersey Supreme Court by its judgment impaired the obligations of the contract under which the defendant-appellee, Erie Railroad Company, was bound to the petitioner-appellant in violation of the Constitution of the United States.

16. Because for divers other reasons the judgment of the New Jersey Supreme Court is illegal and erroneous and should be set aside and the judgment of the Hudson County Court of Common Pleas affirmed.

September 15, 1915.

ZIEGENER & LANE,
Attorneys for Appellant.

HARRY LANE,
Of Counsel.

Service duly acknowledged.

Writ of Certiorari.

(Returnable May 8, 1915.)

NEW JERSEY, *ss:*

[SEAL.]

The State of New Jersey to George G. Tennant, Judge of the Court of Common Pleas of the County of Hudson, and John F. Crosby, Clerk of said Court, Greeting:

We being willing for certain reasons to be certified of and concerning a certain order, proceedings and determination made and
6 rendered by George G. Tennant, Esquire, Judge of the Court of Common Pleas in and for the County of Hudson, which determination was filed with the Clerk of the said Court on March 26th, 1915, in certain proceedings brought on behalf of Amy L. Winfield, petitioner, against Erie Railroad Company, defendant, to recover compensation under an act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, do command you that the said order, proceedings, determination and judgment, together with all things touching and concerning the same, as fully as before you they remain or are in your custody or control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature, at Trenton, on the eighth day of May, 1915, that therein may be done what of right and according to law ought to be done.

Witness, William S. Gummere, Chief Justice of our Supreme Court at Trenton, aforesaid, this nineteenth day of April, A. D. 1915.

WM. C. GEBHARDT, *Clerk.*

COLLINS & CORBIN, *Attorneys.*

7 *Allocatur.*

I allow this writ. Let it be sealed.

F. J. SWAYZE, *J. S. C.*

Dated, April 17, 1915.

Return.

The answer of George G. Tennant, Esquire, Judge of the Court of Common Pleas holden in and for the said County of Hudson, and John J. McGovern, Clerk of said County and within named the record and proceeding of the plaint whereof, mention is within made, with all things touching the same, we certify to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day

and year within contained in a certain schedule to this writ annexed as within we are commanded.

GEORGE G. TENNANT, *Judge.*

Attest:

JOHN J. McGOVERN, *Clerk.*

8 *Petition.*

(Filed January 18, 1915.)

Hudson County Court of Common Pleas.

In the Matter of the Application of AMY L. WINFIELD for Compensation, etc., upon the Death of Her Husband, David R. Winfield, Petitioner,

vs.

ERIE RAILROAD COMPANY, a Corporation, Defendant.

On Petition, etc. Petition.

To His Honor George G. Tennant, Judge of the Hudson County Court of Common Pleas, in and for the County of Hudson and State of New Jersey:

The petition of Amy L. Winfield, of the City of Jersey City, County of Hudson and State of New Jersey, respectfully shows:

1. That she is the widow of David R. Winfield, late of the City of Jersey City aforesaid.

2. That on the 23rd day of October, A. D. 1914, and for over forty years prior thereto, her said husband was employed as a fireman and later as an engineer by the said Erie Railroad Company, a corporation, defendant. That since 1880 he has been employed as an engineer and was detailed in a switch engine in the Bergen Yards, at Croxton, New Jersey; that on the said 23rd day of October, A. D. 1914, at about seven or half-past seven in the evening,

9 while the said David R. Winfield was engaged in the performance of his duties as such engineer and as the result of injuries sustained by him in same and as the result of an accident, while in the performance of his duties on the said 23rd day of October, 1914, he was run over by an engine of the said Erie Railroad Company and instantly killed.

3. That on the 23rd day of October, 1914, and several times thereafter, the said Erie Railroad Company were notified and made aware of the injury and death of the said David R. Winfield, of his employment, the place of the accident and its result.

4. That at the time of the said accident, and the death of the said David R. Winfield he was receiving a salary of ninety-five dollars to one hundred and twenty-five per month. That the amount per month varied in accordance with the number of hours that the said David R. Winfield worked.

5. That there are four children living as the result of the mar-

riage between the petitioner and the said David R. Winfield; that two are married and live away from home and are self-supporting; that the other is twenty-four years old and was partially supported by the said David R. Winfield, not having been able to get steady employment; that the daughter, Sadie McLeer, also lives in the home of the said David R. Winfield with three children; that she was also partially supported by the said David R. Winfield.

6. That the wages of the said David R. Winfield up to the time of his said death *was* paid to your petitioner by the Erie Railroad Company. That the said Erie Railroad Company has refused to pay any compensation under the said workmen's compensation or employers' liability act.

That by virtue of the provisions of an act of the Legisla-
10 ture of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries sustained by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure thereunder, approved April 4th, 1911, and the amendments and supplements thereto, the said Amy L. Winfield, as the widow of the said David R. Winfield, by reason of such death of her said husband, is entitled to compensation by virtue of the said act, and also compensation should be awarded for the two children as aforesaid.

Your petitioner therefore prays that your Honor will make an order fixing and determining the compensation to which your petitioner is entitled as the widow of the said David R. Winfield, and for the said children, and that she, your petitioner, may have such other and further relief as may be just and proper, and that she may be awarded the costs of this proceeding.

And your petitioner, as in duty bound, will ever pray, etc.

AMY L. WINFIELD, *Petitioner.*
ZIEGENER & LANE, *Attorneys.*

STATE OF NEW JERSEY,
County of Hudson, ss:

Amy L. Winfield, of full age, being duly sworn according to law on her oath deposes and says, that she is the petitioner named in and who signed the foregoing petition; that the matters and things therein set forth are true to the best of her knowledge, information and belief.

AMY L. WINFIELD.

11 Sworn and subscribed to before me this 8th day of Jan., A. D. 1915.

ELIZABETH COONS,
Notary Public of New Jersey.

Filed Clerk's Office, Jan. 18, 1915. Hudson County, N. J. John F. Crosby, Clerk.

Order Fixing Day.

(Filed Jan. 18, 1915.)

On motion of Ziegener & Lane, attorneys for the petitioner in the above entitled cause, it is ordered, that Friday, the 5th day of February, A. D. 1915, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, is fixed as the time, and the Court House, Jersey City, Hudson County, New Jersey, as the place for the hearing upon the petition in said matter.

GEORGE G. TENNANT, *Judge.*

Filed Clerk's Office, Jan. 18, 1915. Hudson County, N. J. John F. Crosby, Clerk.

12 *Answer.*

(Filed Jan. 25, 1915.)

The answer of Erie Railroad Company, a corporation having its principal office at foot of Pavonia Avenue, Jersey City, New Jersey, shows:

1. It has no knowledge of the allegations of paragraph one of the petition and leaves petitioner to make such proof thereof as she may be advised.

2. It admits the allegations of paragraph two.

3. It admits the allegations of paragraph three.

4. It denies that at the time of his death the said deceased was receiving a salary of $95 to $125 per month, and says that such salary for the six months next preceding the accident varied from $83.64 per month, to $112.78 per month, and further says that at the time of the accident, petitioner's decedent was earning 41 cents per hour for a day of 10 hours.

5. It has no knowledge of the allegations of paragraph five, and leaves petitioner to make such proof thereof as she may be advised, but says that even though the allegations therein contained are true, none of the said children are dependent within the meaning of the act under which the petition herein was filed.

6. It denies the allegations of paragraph six, except that it admits that the wages of the said petitioner's decedent were paid by the Erie Railroad Company up to the time of his said death and that said defendant has refused to pay any compensation under the act under which petition herein was filed.

7. Further answering, this defendant says that at the time of the accident set forth in the petition, this defendant was engaged in commerce between and among the several states and territories of the United States and also between the several states and territories of the United States and foreign nations, and that said David R. Winfield was employed by it as such carrier in such commerce and that the legal rights of the petitioner and this

13

defendant are determined exclusively by the Act of Congress of the United States, entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and the amendments thereto and supplements thereof, and that therefore this Court and the Judge thereof has no jurisdiction to entertain the petition in this matter or to make any order thereunder.

The defendant therefore prays that the petition herein be dismissed, with costs.

COLLINS & CORBIN,
Attorneys of Defendant.

STATE OF NEW YORK,
County of New York, ss:

David Bosman, of full age, being duly sworn according to law upon his oath, says that he is the Vice President and Secretary of Erie Railroad Company, a corporation, the defendant mentioned in the foregoing answer; that he has read the foregoing answer and the same is true to the best of his knowledge and belief.

DAVID BOSMAN.

Subscribed and sworn to *at* this 25th day of January, A. D. 1915, before me, the subscriber, a — in and for said County and State duly commissioned and sworn, as witness my hand and official seal.

[SEAL.] LAURA E. SMITH,
Notary Public, Kings County, No. 226.

14 Certificate, filed in New York County, No. 86. Kings County Register's No. 6321, New York County Register's No. 5256.

Filed, Clerk's Office, Jan. 25, 1915. Hudson County, N. J. John F. Crosby, Clerk.

Order of Continuance.

(Filed February 6, 1915.)

It is, on this fifth day of February, A. D. 1915, ordered, that the hearing in the above entitled matter be and the same is hereby continued until Friday, the fifth day of March, A. D. 1915, at the Court House, at Jersey City, at ten o'clock in the forenoon, or as soon thereafter as the matter can be heard.

GEORGE G. TENNANT, *Judge.*

We hereby consent to the above order.

ZIEGENER & LANE,
Attorneys for Petitioner.
COLLINS & CORBIN,
Attorneys for Defendant.

Filed, Clerk's Office, Feb. 6, 1915, Hudson County, N. J. John F. Crosby, Clerk.

15 *Determination and Rule for Judgment.*

(Filed April 8, 1915.)

A petition has been filed in the above entitled matter, praying for the compensation to which the petitioner may be entitled by virtue of the provisions of an Act of the Legislature of the State of New Jersey, entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, regulating the procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, together with the supplements thereto and amendments thereof; and a time and place for the hearing on the said petition having been fixed;

And it appearing to the Court that the said petition and the order fixing the time and place for the said hearing were duly served upon the defendant, on the 19th day of January, A. D. 1915, and the petitioner and the defendant having appeared on the 12th day of March, A. D. 1915, the date to which the summary hearing herein had been regularly continued, the petitioner being represented by Ziegener & Lane, attorneys for the petitioner, and the defendant by Collins & Corbin, its attorneys, and on said date, the Court having heard the testimony offered on behalf of the parties hereto and counsel having been heard:

I do find and determine from the evidence taken and submitted in this case, and from the facts agreed upon by counsel, as follows, to wit:

1. I find that the petitioner is the widow of David R. Winfield, deceased, and at the time of his death, to wit, on October 23rd, 1914, was an actual dependent on him.

16 2. It is admitted and I find that the said David R. Winfield, deceased, on the twenty-third day of October, A. D. 1914, was an employee of the defendant, Erie Railroad Company, a corporation, and was killed as the result of an accident arising out of and in the course of his employment by said defendant.

3. It is admitted and I find that the said David R. Winfield, deceased, for about forty years prior to October 23rd, 1914, had been employed first as a fireman and later as an engineer by the said Erie Railroad Company, a corporation, defendant; that since 1880, he has been employed as an engineer and was detailed in a switch or drill engine in the Croxton yards of the Erie Railroad Company, defendant, at Jersey City, New Jersey; that on the said 23rd day of October, A. D. 1914, the said deceased had placed his engine on the ash-pit, which was the place he was directed to leave his engine for the night, and was killed while walking across the tracks of the defendant on his way home.

4. It is admitted and I find that the duties of the said deceased in his employment by the defendant never took him outside of the State of New Jersey; that his duties consisted in drilling, or moving with his engine freight cars which contained interstate commerce

between various states of the Union and intrastate commerce wholly between points within the State of New Jersey; that said cars were cars containing freight known as package freight, or less than carload lots, and that his duties consisted in drilling said cars so that the freight could be sorted and collected in cars going to points to which the freight was consigned; he would also move empty cars as necessary to carry out his general work of this character and the last act which he did on the day in question before taking his
17 engine to the ash-pit, was the sorting of the cars which had been removed from the transfer platform where the freight was sorted so that the cars themselves would be ready to be moved on freight trains to their destinations; that his duties had been in general the same from 1880 to the date of his death.

5. It is admitted and I find that the wages of the deceased at the time of his death, to wit, October 23, 1914, amounted to twenty-four dollars and sixty cents per week, and that the defendant had knowledge of the said accident, which resulted in the death of the said David R. Winfield.

6. It is admitted and I find that the funeral expenses of the deceased amounted to over the sum of two hundred dollars.

7. I find that the said accident arose out of and in the course of the employment of the said David R. Winfield; that the deceased, at the time of the accident, was not engaged in a service which was part of interstate commerce or commerce between any of the several States; that at the time of his death the deceased had placed his engine in its proper place for the night and was killed while walking across the tracks of the defendant on his way home.

8. I further find that the petitioner is entitled to compensation on behalf of herself, at the rates of eight dollars and sixty-one cents per week, for a period of three hundred weeks from the 23rd day of October, A. D. 1914, and expenses of burial in the sum of one hundred dollars, besides the cost of this proceeding to be taxed:

It is therefore on this 26th day of March, A. D. nineteen hundred and fifteen, on motion of Ziegener & Lane, attorneys for the petitioner, ordered that the defendant herein pay, or cause to be
18 paid, to the said petitioner the sum of eight dollars and sixty-one ($8.61) cents per week for a period of three hundred weeks, from the 23rd day of October, A. D. 1914, and expenses of burial in the sum of one hundred dollars, and also the costs of this proceeding, amounting to the sum of thirty-nine and 05/100 dollars.

It is further ordered that judgment final be entered in favor of the petitioner, Amy L. Winfield, and against the defendant, Erie Railroad Company, a corporation, for the sum of eight dollars and sixty-one ($8.61) cents per week for three hundred weeks, from the 23rd day of October, A. D. 1914, and the sum of one hundred dollars for burial expenses, and also the costs of this proceeding, amounting to the sum of thirty-nine dollars and five cents.

It is further ordered that Ziegener & Lane, the attorneys for the petitioner, be, and they are hereby, allowed the sum of three hundred dollars, counsel fee herein, to be paid by petitioner.

And it is further ordered that a true copy of this order, together

with a copy of the costs so taxed, shall be served upon the said defendant or its attorneys.

GEORGE G. TENNANT, *Judge.*

We consent to form of above order.

ZIEGENER & LANE,
Attorneys for Petitioner.
COLLINS & CORBIN,
Attorneys for Defendant.

Filed, Clerk's Office, Apr. 8, 1915. Hudson County, N. J. John F. Crosby, Clerk.

19 *Testimony.*

Hudson County, Court of Common Pleas.

Tennant, J.

AMY L. WINFIELD
vs.
ERIE RAILROAD COMPANY.

On Petition for Compensation under Employers' Liability Act.

Testimony taken in the trial of the above stated case, March 15, 1915, before Hon. George G. Tennant, Judge.

Appearances:

Mr. Harry Lane, for the petitioner.
Mr. Corbin (Collins & Corbin), for the respondent.

The Court: Is it agreed that the deceased was employed by the respondent?
Mr. Corbin: Yes.
The Court: That the injury or death occurred in the course of, and grew out of, his employment.
Mr. Corbin: Yes.
The Court: What his wages were?
Mr. Lane: I have agreed to take the Erie's figures for the last six months.
Mr. Corbin: It varied from $83.64 to $112.78 per month, more than twenty dollars per week. He was engineer on a shifting engine at Croxton, the west end of the Bergen Tunnel, in Hudson County.
The Court: Did the respondent have notice of the injury?
Mr. Corbin: Yes.
The Court: Any medical services or hospital fees?
Mr. Lane: No, sir.

The Court: Undertaker's bill paid?

20 Mr. Lane: I am not sure.

Mr. Corbin: It is a question of interstate commerce and who are the dependents.

Mr. Lane: I have agreed to strike out everybody except the widow.

The Court: The only dependent is the petitioner, the widow of the deceased?

Mr. Lane: Yes.

The Court: The only questions you need to ask, or to take testimony upon, are as to the nature of the service in which the deceased was employed at the time of his death.

Mr. Lane: Yes. The Court does not care, then, to have proof as to the widow being his widow?

The Court: I understand that is agreed.

AMY L. WINFIELD, the petitioner, being sworn, testified as follows:

Direct examination by Mr. Lane:

Q. Was Mr. David R. Winfield your husband?
A. Yes.
Q. He is dead?
A. Yes.
Q. When was he killed?
A. The 23rd of October, 1914.
Q. Did he work for the Erie Railroad Company?
A. Yes.
Q. Have you your marriage certificate?
A. Yes.

By the Court:

Q. You are his widow?
A. Yes.
Q. What is your age?
A. Fifty-nine.
Q. Was he your means of support?
A. Yes.

No cross-examination.

21 Mr. Lane: I think we can agree as to what the deceased was doing at the time of his death. I have subpœnaed several witnesses of the death.

Mr. Corbin: It is agreed that the nature of the employment of deceased was as follows, from the records of the Erie Railroad Company: Entered service as fireman December 23, 1871, promoted to engineer January 1, 1880, continued in service as engineer up to and including the date of his death, October 23, 1914.

Mr. Lane: That he never ran any engines at any time during his employment or any trains, out of the State of New Jersey; that his services were wholly within the State of New Jersey.

Mr. Corbin: The intent of this latter stipulation being to agree

that the deceased, physically, in the course of his employment, never went out of the State.

Mr. Lane: That he was engineer, with a steady engine, a drill engine, to transfer cars from the Croxton yard to the transfer station, and sometimes he would run some in from Newark to the different factories—sort of a drill engine around the Erie yards; that at the time of his death he had worked all that day and had put his engine on the ash pit where they leave the engines to have the ashes go down for the night and where it was his duty to leave his engine; that he left his engine and started to walk home, or somewhere, across the tracks which he had to cross, and an engine came along and killed him. Our contention is that while he may have
22 been engaged in both interstate and intrastate commerce at the time of his death——

The Court: What had he been doing?

Mr. Lane: The proof is there——

The Court: It is pretty close to the margin.

Mr. Corbin: Pretty close. It is like the Lincks case.

The Court: It is stronger than the Lincks case. Here is a man who is engaged in both interstate and intrastate commerce—assume that it is so—what time of day did the injury occur?

Mr. Corbin: Six-forty-five or six-fifty.

The Court: His work for the day had been done?

Mr. Corbin: Just left his engine, starting home.

The Court: What had he done last before taking the engine to the pit?

Mr. Corbin: I will have to explain the matter to make it perfectly clear. The transfer this crew was working at is the transfer for cars carrying less than carload lots; this crew, including the deceased, moved a large number of cars from this place called the transfer; the last thing he did was to go to the yard where he had left these cars he had moved from the transfer, and start sorting them, so they would be arranged in proper order, with his drill engine. The crew moved the cars, and in their spare time they would go to the yard where they left them, and sort them out, so that they would be convenient to go out over the road or to New York City. That was the last thing he did, before taking his engine to the ash pit. He
23 then took his engine to the ash pit, where it was his duty to leave it, left it for the night, started to go home, and was killed before he got out of the yard.

The Court: I shall render judgment in this case for the petitioner, on the agreed state of facts. You may draw up an order to that effect.

I, Frederick N. Esher, a stenographer regularly acting for George P. Kelly, the official stenographer of the County of Hudson, duly appointed to report stenographically the evidence given before the courts of said county and the judges of said courts, in all cases, hearings and proceedings, do hereby certify that the foregoing is a transcript of the evidence given on March 12th, 1915, and stipulations and agreements, before Honorable George G. Tennant, Judge

of the Hudson County Court of Common Pleas, upon the hearing of a petition filed by Amy L. Winfield, administratrix of David R. Winfield, against Erie Railroad Company.

In witness whereof, I have hereunto set my hand and seal this 20th day of April nineteen hundred and fifteen.

[SEAL.] FREDERICK N. ESHER.

I, John J. McGovern, Clerk of the County of Hudson and also Clerk of the Hudson County Court of Common Pleas, do hereby certify that the foregoing is a transcript of the evidence given, and stipulations and agreements, upon the hearing of the petition of Amy L. Winfield, administratrix of David R. Winfield, against Erie Railroad Company, on March 12, 1915, as certified by Frederick N. Esher, the stenographer appointed to report such evidence stenographically.

24 In witness whereof, I have hereunto set my hand and seal this twenty-first day of April, nineteen hundred and fifteen.

[SEAL.] JOHN J. McGOVERN, *Clerk.*

Reasons.

(Filed April 30, 1915.)

The prosecutor herewith files the following reasons upon which it will rely for a reversal of the determination and order for judgment in this case.

1. Judgment should have been entered denying the compensation claimed by the petitioner and dismissing the petition.

2. The determination and finding of fact by the Judge of the Hudson County Court of Common Pleas was not in accordance with the provisions of an act of the Legislature of the State of New Jersey, entitled: "An Act prescribing the liability of an employer to make compensation for the injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder, approved April 4th, 1911, and the supplements and amendments thereto.

3. The determination of fact by the Judge of the Hudson County Court of Common Pleas was not based upon the evidence.

4. The Hudson County Court of Common Pleas and the Judge thereof had no jurisdiction to entertain the petition in this matter or to make any order thereunder, because the legal rights

25 of the petitioner and defendant are determined exclusively by the Act of Congress of the United States, entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," Approved April 22, 1915, and the supplements and amendments thereof.

5. The evidence is that the defendant Erie Railroad Company, at the time of the accident set forth in the petition, was engaged in commerce between and among the States of New York, New Jersey and Pennsylvania and other States by means of its connecting lines,

and that David R. Winfield, for whose death compensation is being sought, was employed at the time of his death as engineer by it as such carrier in such commerce.

COLLINS & CORBIN,
Attorneys for Defendant-Prosecutor.

26 *Opinion of the Supreme Court.*

(Filed July 6th, 1915.)

New Jersey Supreme Court, June Term, 1915.

AMY L. WINFIELD, Administratrix of David R. Winfield, Deceased, Petitioner-Defendant,
vs.
ERIE RAILROAD COMPANY, Respondent-Prosecutor.

On Certiorari.

Argued June 3, 1915. Decided June —, 1915.

Messrs. Ziegener & Lane, for petitioner-defendant.
Messrs. Collins & Corbin, for respondent-prosecutor.

Before Justices Garrison, Trenchard, and Black.

Per Curiam:

The petitioner, Amy L. Winfield, filed a petition in the Hudson County Court of Common Pleas, asking that she be awarded compensation for the death of her husband, David R. Winfield.

There is no dispute about the facts. The record shows that David R. Winfield since 1880 had been employed as an engineer by the Erie Railroad Company; that he was a switch engineer in the Bergen Yards at Croxton, New Jersey; that on the twenty-third day of October, 1914, about six-forty five in the evening, he was run over by an engine of the said respondent and instantly killed. His duties never took him outside of the State of New Jersey. They
27 consisted in drilling or moving with his engine freight cars containing both interstate and intrastate commerce. On the day he was killed, he had finished his work and had taken his engine to the ash-pit. He started to go home, across the tracks of the respondent, when he was struck by a locomotive and killed. The sole question is whether the act of Congress of the United States or the New Jersey Workmen's Compensation Act applies. The trial judge held that the latter act applied.

This, we think, was error. The case is controlled by that of North Carolina R. R. Co. v. Zachary, 232 U. S., 248, in the Supreme Court of the United States. Mr. Justice Pitney, speaking for the Court said, that in order to bring the case within the terms of the Federal Act, (Employers' Liability Act of 1908, 35 Stat. 65, c. 149), the de-

fendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce and the injured employe must have been employed by such carrier in such commerce. When the defendant is a common carrier engaged in interstate commerce and the employe for whose injuries the suit is brought was employed by the defendant in such commerce the Federal Employers' Liability Act of 1908 governs to the exclusion of the state statutes. Although the decedent was absent temporarily from his train for a short time for a purpose not inconsistent with his duty to his employer, a railroad employe may still be on duty and engaged in interstate commerce within the meaning of the Employers' Liability Act of 1908.

The judgment of the Hudson County Court of Common Pleas is reversed.

28 *Rule of Reversal.*

(Entered July 10th, 1915.)

New Jersey Supreme Court, June Term, 1915.

AMY L. WINFIELD, Administratrix of David R. Winfield, Deceased, Petitioner-Defendant,
vs.
ERIE RAILROAD COMPANY, Respondent-Prosecutor.

On Certiorari from Hudson County Court of Common Pleas.

This cause having been duly argued at the June Term, 1915, of this court by Collins & Corbin, of counsel for respondent-prosecutor, and Ziegener & Lane, of counsel for petitioner-defendant, and the court having inspected the proceedings of the judgment returned with the certiorari in this cause and the reasons assigned for reversal.

It is thereupon, on this ninth day of July, in the year of our Lord, one thousand nine hundred and fifteen ordered, that the judgment of the said Hudson County Court of Common Pleas be in all things reversed, set aside and for nothing holden and said record is hereby remitted to the court below to be proceeded with according to law.

On motion of

COLLINS & CORBIN,
Attorneys of Respondent-Prosecutor.

Entered July 10th, 1915.

A true copy.

WM. C. GEBHARDT, *Clerk.*

29 Form C 248—11-9-15—C5

STATE OF NEW JERSEY:

Court of Errors and Appeals, Nov. Term, 1915.

AMY L. WINFIELD
and
ERIE RAILROAD CO.

Appeal from Supreme Court.

No. 113 of Nov. Term, 1915.
Date Jan'y 6th, 1916.
Chancellor presiding.
Opinion by Chief Justice.

Check List.

	Affirmed.	Reversal.	M.
The Chancellor	.....	1	.....
" Chief Justice	.....	1	.....
Mr. Justice Swayze	.....	1	.....
" " Parker	.....	1	.....
" " Bergen	.....	1	.....
" " Minturn	.....	1	.....
" " Kalisch	.....	1	.....
Judge Heppenheimer	.....	1	.....
" Williams	.....	1	.....
Totals	.....	9	.....

Filed Jan. 6, 1916. Thomas F. Martin, Clerk.

30 New Jersey Court of Errors and Appeals.

AMY L. WINFIELD
vs.
ERIE RAILROAD COMPANY.

Appeal from a Judgment of the Supreme Court.

For the appellant, Harry Lane.
For the respondent, Clement K. Corbin.

The opinion of the Court was delivered by GUMMERE, *C. J.*:

Mrs. Winfield, the appellant, instituted proceedings in the Hudson County Court of Common Pleas, under the Workmen's Compensation Act of 1911, to have compensation awarded to her for the death of her husband, which resulted from an accident occurring in the

course of his employment with the defendant company, and which arose out of that employment. Her claim for such compensation was based upon the second section of the statute which provides that "When employer and employe shall by agreement either express or implied, as hereinafter provided, accept the provisions of section 2 of this act, compensation for personal injuries to, or for the death of, such employe by accident arising out of and in the course of his employment, shall be made by the employer without regard to the negligence of the employer, according to the schedule "set forth in the act. The defendant company set up, as a bar to her right to proceed under the state statute, that, at the time of the accident, it was engaged in commerce between and among the several states and
31 territories of the United States, and the petitioner's decedent was employed by it in such commerce; and that, therefore, the legal rights of the petitioner and obligations of the defendant were to be determined exclusively by the act of Congress of the United States entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and the amendments thereto and supplements thereof.

When the matter came on to be heard the Common Pleas Court held, on the evidence submitted, that the petitioner's decedent was not employed by the defendant in interstate commerce at the time of the accident which caused his death, and that, consequently the Federal statute had no application. It thereupon proceeded to fix the petitioner's compensation in accordance with the schedule provided by the state statute and judgment was entered accordingly.

The defendant company sued out a writ of certiorari to review the validity of the judgment so entered, and the Supreme Court upon the return of the writ held the finding of the lower court that decedent at the time of his death was not employed by the defendant in interstate commerce to be erroneous; that the contrary was shown to be the fact; and that, therefore, the Federal Employers' Liability Act of 1908 governed the right of the petitioner to obtain compensation for her husband's death to the exclusion of the state statute. It for this reason reversed the judgment of the Court of Common Pleas, and from the judgment of reversal the petitioner has appealed to this court.

32 We do not find it necessary to determine whether the appellant's decedent came to his death while employed by the defendant in interstate commerce as the Supreme Court held, or while employed in intrastate commerce as was found by the Court of Common Pleas, but will assume, for the purpose of deciding this appeal, that the conclusion of the Supreme Court as to the character of his employment was justified by the facts proved. The question then is whether the widow of an employe of a common carrier by railroad which is engaged in interstate commerce, who comes to his death while he is employed by such carrier in such commerce, must in all cases bring her action to recover compensation under the Federal Employers' Liability Act. This question we think must be answered in the negative. It may be conceded (although we are not to be considered as so holding) that in all cases where the Federal

statute affords a remedy, that statute controls to the exclusion of all state laws; but it cannot be that where the Federal act affords no remedy—that is, where the death of the employe occurs under such circumstances that no liability is imposed on the carrier by that act—the widow cannot enforce a remedy which is given to her by a state statute. An examination of section 1 of the Federal statute shows that the liability of the carrier imposed by that act is limited to cases where the death of the employe results in whole or in part from the negligence of an officer, agent or employe of such carrier, or occurs by reason of some defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. When death results to an em-
33 ployé without such negligence being present as a producing cause either wholly or partly, the statute imposes no liability upon the carrier. It must follow, therefore, we think, that in order to oust the Court of Common Pleas of jurisdiction in a proceeding brought under our Workmen's Compensation Act it must affirmatively appear either in the pleadings or the proofs that a right of action is given to the widow or personal representatives of the deceased employe by the Federal statute; in other words, that his death resulted in whole or in part from negligence chargeable to the defendant company; for such negligence will not be presumed.

What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, but a contractual obligation created by section 2 of our Workmen's Compensation Act with the consent of both employer and employe, and which exists although no negligence can be imputed to the employer. And this we consider she is entitled to do in the absence of any averment by her, or any proof offered, or any admission made by the defendant company showing that the death of her decedent resulted from defendant's negligence, and thus created a liability against it under the Federal statute. No such averment is contained in her petition; no such admission appears in the defendant's answer; and no proof of defendant's negligence was offered by either party.

We conclude, therefore, that the judgment of the Supreme Court should be reversed.

Endorsed: "Filed Jan. 6, 1916. Thomas F. Martin, Clerk."

34 [Endorsed:] New Jersey Court of Errors and Appeals, November Term, 1915. Amy L. Winfield vs. Erie Railroad Company. Opinion.

35 New Jersey Court of Errors & Appeals.

In the Matter of the Application of AMY L. WINFIELD for Compensation upon the Death of Her Husband, David R. Winfield, Petitioner-Appellant,

vs.

ERIE RAILROAD COMPANY, a Corporation, Defendant-Respondent.

On Appeal.

Rule for Judgment.

This cause having been duly opened at the November Term, 1915, of this Court by Harry Lane counsel for the petitioner-appellant and Clement K. Corbin, counsel for the defendant-respondent, and the court having inspected the proceedings and considered the same and being of the opinion that the judgment of the New Jersey Supreme Court reversing the judgment of the Hudson County Court of Common Pleas, should be reversed and the judgment of the Hudson County Court of Common Pleas should be affirmed;

It is thereupon, ordered and adjudged that the judgment of the New Jersey Supreme Court, removed by appeal to this Court, reversing the judgment of the Hudson County Court of Common Pleas in this matter, be reversed and that the judgment of the Hudson County Court of Common Pleas be affirmed, with costs; and that the record be removed to the New Jersey Supreme Court to be proceeded with in accordance with the rules and practice of said court.

On motion of

ZIEGENER & LANE,
Attorneys for Appellant.

Endorsed: "Filed Jan. 13, 1916. Thomas M. Martin, Clerk."

36 New Jersey Court of Errors and Appeals.

AMY L. WINFIELD, Appellant,
vs.
ERIE RAILROAD COMPANY, a Corporation, Respondent.

Petition for Writ of Error.

Erie Railroad Company, a corporation, respondent in the above entitled cause, feeling aggrieved by the judgment of this Court entered on January 13th, 1916, reversing the final judgment of the Supreme Court of the State of New Jersey herein, dated July 9, 1915, which judgment reversed a judgment of the Hudson County Court of Common Pleas in favor of the appellant and against the respondent for the sum of $8.51 per week for 300 weeks from the 23rd day of October, A. D. 1914, and the sum of $100 for funeral expenses, and also the costs of said proceeding amounting to the sum of $39.05, comes now by Collins & Corbin, its attorneys and shows:

1. That in the record and proceedings in the above cause there is manifest error in this, that by the record aforesaid it appears that the judgment herein was given in favor of the appellant and against the respondent and that by the judgment of said Court of Errors and appeals, the final judgment of the Supreme Court of New Jersey was reversed, whereby the jurisdiction of the Hudson County Court of Common Pleas and the Judge of said Court, under an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, estab-
37 lishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, (being Chapter 95, P. L. 1911) and the amendments thereof and supplements thereto, was sustained, notwithstanding the fact that at the time of the accident to appellant's decedent, for whose death this action was brought, the respondent Erie Railroad Company was engaging in commerce between the several states or territories, and between the states and territories, and between the District of Columbia and the states or territories, and between the District of Columbia, and the states and territories and foreign nations, and the said decedent was employed by it as such carrier in such commerce and that therefore the legal rights of the appellant and respondent are determined by the Act of Congress of the United States, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, and the amendments thereof and supplements thereto, whereas by the law of the land the said judgment ought to have been affirmed and the Hudson County Court of Common Pleas and the Judge of said Court held to be without jurisdiction in the premises for the reason that under the provisions of the Constitution of the United States that the Congress shall have

power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and that such Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, said statute passed by the Congress of the United States is exclusive of the remedies provided by said statute of the Legislature of the State of New Jersey, and the said Hudson County Court of Common Pleas and the Judge of said Court were therefore without jurisdiction in the premises.

2. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court
38 of Errors and Appeals in the above cause, violates the Constitution of the United States because by such construction the said statute operates as a regulation of, a burden upon and an interference with interstate commerce, contrary to Article I, Section VIII, paragraph 3 of said Constitution.

3. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals in the above cause, is in violation of and in conflict with the said Act of Congress of the United States of April 22, 1908, in that the purpose and intent of the contract implied in said New Jersey Act, in Section 2 thereof, are to enable common carriers to exempt themselves from the liability created by said Act of Congress.

4. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals in the above cause, violates the Constitution of the United States in that it abridges the privileges and immunities of the respondent and deprives the respondent of its property without due process of law, and denies to the respondent the equal protection of the laws, contrary to the Fourteenth Amendment of said Constitution of the United States.

Your petitioner therefore prays said Court for an order allowing your petitioner to prosecute a writ of error to the United States Supreme Court under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioner shall give and furnish on said writ of error and that upon the giving of such security all further proceedings in this Court shall be re-
39 strained and stayed until the determination of said writ of error by the United States Supreme Court.

And your petitioner will ever pray, etc.

COLLINS & CORBIN,
Attorneys of Petitioner.

40 [Endorsed:] New Jersey Court of Errors and Appeals. Amy L. Winfield, Appellant, vs. Erie Railroad Company, a corporation, Respondent. Petition for Writ of Error. Collins & Corbin, Attorneys for Respondent, 243 Washington Street, Jersey City, N. J. Filed Jan. 14, 1916. Thomas F. Martin, Clerk.

41 New Jersey Court of Errors and Appeals.

AMY L. WINFIELD, Appellant,
vs.
ERIE RAILROAD COMPANY, a Corporation, Respondent.

Order Allowing Writ of Error.

Upon reading and filing petition for writ of error and assignments of error to review the judgment entered in the above entitled cause reversing the final judgment of the Supreme Court of New Jersey, dated July 9, 1915:

It is ordered that a writ of error be and it hereby is allowed to have reviewed in the United States Supreme Court, the said judgment heretofore entered herein, and that the amount of bond on said writ of error be and it hereby is fixed at Five thousand dollars.

Dated, January 14th, 1916.

E. R. WALKER,
Presiding Judge of the New Jersey Court of Errors and Appeals.

42 [Endorsed:] New Jersey Court of Errors and Appeals. Amy L. Winfield, Appellant, vs. Erie Railroad Company, a corporation, Respondent. Order Allowing Writ of Error. Collins & Corbin, Att'ys for Respondent, Jersey City, N. J. Filed Jan. 14, 1916. Thomas F. Martin, Clerk.

43 Know all men by these presents, that we Erie Railroad Company, a corporation of the State of New York, as principal, and American Surety Company of New York, a corporation of the State of New York, as surety, are held and firmly bound unto Amy L. Winfield, of Jersey City, New Jersey, in the just and full sum of Five thousand Dollars ($5,000) to be paid to her, her certain attorneys, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our respective corporate seals and dated the 12th day of January, in the year of our Lord, One thousand, nine hundred and sixteen.

Whereas, lately at the session of the Court of Errors and Appeals of the State of New Jersey in an action pending in said Court between Amy L. Winfield, appellant, and Erie Railroad Company, a corporation, respondent, final judgment was rendered reversing the judgment of the Supreme Court of the State of New Jersey in favor of the said respondent, and the said respondent having obtained from said Court a writ of error to reverse the judgment in the aforesaid action and a citation directed to said Amy L. Winfield is about to be issued, citing and admonishing her to be and appear at a Supreme Court of the United States at Washington.

Now the condition of the above obligation is such that if the Erie

Railroad Company shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it,
44 if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

ERIE RAILROAD COMPANY,
By DAVID BOSMAN, *Vice President.*

Attest:
[SEAL.] J. E. PACKER,
Assistant Secretary.

O. K.
H. A. T.

AMERICAN SURETY COMPANY
OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice President.

Attest:
[SEAL.] LOUIS PAPEN,
Resident Assistant Secretary.

45 American Surety Company of New York.

Capital and Surplus Over $6,000,000.

STATE, COUNTY AND CITY OF NEW YORK, *ss:*

On this 12th day of January, 1916, before me, the subscriber, a Foreign Commissioner of Deeds for the State of New Jersey, in the State of New York, duly commissioned and sworn, personally came Louis Papen, who, being by me duly sworn, on his oath, saith: that he is one of the Resident Assistant Secretaries of the American Surety Company of New York, of the State of New York; that he resides in New Durham, N. J., that he knows Marshall L. Brower, Resident Vice President of the American Surety Company of New York, and he knows too, the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal; and that it was affixed by the said Resident Vice President of said Company, attested by deponent as Resident Assistant Secretary by order of the Board of Trustees of said Company, in deponent's presence, as the voluntary act and deed of said Company; that said Company has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the year 1902, and the amendments thereof and supplements thereto; that the good available assets of the Company exceed its liabilities as such liabilities are ascertained in the manner provided in said Chapter; that the American Surety Company of New York is duly incorporated under the laws of the State of New York, and is authorized by the laws of the State and under its charter to become surety on bonds and obligations such as are mentioned in said Chapter; that it has on deposit with the Superintendent of Insurance of the State of New York, good securities worth at par and at market value at least Two Hundred Thousand Dollars ($200,000) held as security for all holders of its obligations, and has a fully paid up, safely invested, and unimpaired

capital of Two Million, Five Hundred Thousand Dollars; that said Company has appointed the Commissioner of Banking and Insurance as its Attorney in the State of New Jersey, upon whom process of law can be served and has filed in the office of the Commissioner of Banking and Insurance a written instrument duly signed and sealed, certifying such appointment, and that the following is a true copy of a Resolution of the Board of Trustees of the said American Surety Company of New York, passed on the 19th day of January, 1915, at its regular Quarterly Meeting, to-wit:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized to execute and to deliver and to attach the seal of the Company to any and all obligations for *on* on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

LOUIS PAPEN,
Resident Assistant Secretary.

Sworn and subscribed in the City of New York in the County and State of New York, this 12th day of January, A. D. 1916, before me, a Foreign Commissioner of Deeds for the State of New Jersey, in the State of New York, duly commissioned and sworn.

[SEAL.] E. F. WATSON,
A Foreign Commissioner of Deeds.

46 [Endorsed:] New Jersey Court of Errors and Appeals. Amy L. Winfield, Appellant, vs. Erie Railroad Company, a corporation, Respondent. Bond on Writ of Error to United States Supreme Court. Collins & Corbin, Att'ys of Respondent, Jersey City, N. J. Approved January 14, 1916. E. R. Walker, Presiding Judge, Court of Errors and Appeals of New Jersey. Filed Jan. 14, 1916. Thomas F. Martin, Clerk.

47 I, Thomas F. Martin, Secretary of State of the State of New Jersey and ex officio Clerk of the Court of Errors and Appeals, do hereby certify that the original bond in the case of Erie Railroad Company, plaintiff in error, and Amy L. Winfield, defendant in error, was lodged in this office on the Fourteenth day of January, Nineteen hundred and sixteen.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Trenton, this Seventeenth day of January, Nineteen hundred and sixteen.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN, *Clerk.*

48 UNITED STATES OF AMERICA, *ss:*

[Seal District Court of the United States, District of New Jersey.]

The President of the United States to the Honorable Judges of the Court of Errors and Appeals of the State of New Jersey, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Errors and Appeals of the State of New Jersey before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had, in an action between Amy L. Winfield, appellant, and Erie Railroad Company, a corporation, respondent, manifest error hath happened to the great damage of Erie Railroad Company, respondent, as by its complaint appears; we, being willing that error, if any hath been, should be duly corrected and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the nineteenth day of January, instant, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and Constitution of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief
49 Justice of the United States, the Fourteenth day of January, Nineteen hundred and sixteen.

GEORGE T. CRAMNER,
Clerk of the United States District Court
for the District of New Jersey,
By CHARLES S. CHEVRIER, *Deputy.*

50 [Endorsed:] United States Supreme Court. Erie Railroad Company, a corporation, Plaintiff in error, vs. Amy L. Winfield, Defendant in error. Writ of Error. Ret'ble January 21, 1916. Gilbert Collins and George S. Hobart, Attorneys. Allowed by E. R. Walker, Presiding Judge of the New Jersey Court of Errors and Appeals. Filed Jan. 14, 1916. Thomas F. Martin, Clerk.

51 I, Thomas F. Martin, Secretary of State of the State of New Jersey and ex officio Clerk of the Court of Errors and Appeals, do hereby certify that the original writ of error in the case of Erie Railroad Company, a corporation, plaintiff in error, and Amy L. Winfield, defendant in error, was lodged in this office on the Fourteenth day of January, A. D. 1916, together with a copy thereof for the said defendant in error.

In testimony whereof, I have hereunto set my hand and affixed

my official seal, at Trenton, this Seventeenth day of January, Nineteen hundred and sixteen.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN, *Clerk.*

52 New Jersey Court of Errors and Appeals.

AMY L. WINFIELD, Appellant,
vs.
ERIE RAILROAD COMPANY, a Corporation, Respondent.

Assignments of Error.

Erie Railroad Company, by Collins & Corbin, its attorneys, comes and files the following assignments of error upon which it will rely, and says:

1. That in the record and proceedings in the above cause there is manifest error in this, that by the record aforesaid it appears that the judgment herein was given in favor of the appellant and against the respondent and that by the judgment of said Court of Errors and Appeals, the final judgment of the Supreme Court of New Jersey was reversed, whereby the jurisdiction of the Hudson County Court of Common Pleas and the Judge of said Court, under an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, (being Chapter 95, P. L. 1911) and the amendments thereof and supplements thereto, was sustained, notwithstanding the fact that at the time of the accident to appellant's decedent, for whose death this action was brought, the respondent Erie Railroad Company was engaging in commerce between
53 the several states or territories, and between the states and territories, and between the District of Columbia and the states or territories, and between the District of Columbia, and the states and territories and foreign nations, and the said decedent was employed by it as such carrier in such commerce and that therefore the legal rights of the appellant and respondent are determined by the Act of Congress of the United States, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, and the amendments thereof and supplements thereto, whereas by the law of the land the said judgment ought to have been affirmed and the Hudson County Court of Common Pleas and the Judge of said Court held to be without jurisdiction in the premises for the reason that under the provisions of the Constitution of the United States that the Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and that such Constitution and the laws of the United States which shall be made

in pursuance thereof shall be the supreme law of the land, said statute passed by the Congress of the United States is exclusive of the remedies provided by said statute of the Legislature of the State of New Jersey, and the said Hudson County Court of Common Pleas and the Judge of said Court were therefore without jurisdiction in the premises.

2. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals in the above cause, violates the Constitution of the United States because by such construction the said statute operates as a regulation of, a burden upon and an interference with interstate commerce, contrary to Article I, Section VIII, paragraph 3 of said Constitution.

3. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court
54 of Errors and Appeals in the above cause, is in violation of and in conflict with the said Act of the Congress of the United States of April 22, 1908, in that the purpose and intent of the contract implied in said New Jersey Act, in Section 2 thereof, are to enable common carriers to exempt themselves from the liability created by said Act of Congress.

4. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals in the above cause, violates the Constitution of the United States in that it abridges the privileges and immunities of the respondent and deprives the respondent of its property without due process of law, and denies to the respondent the equal protection of the laws, contrary to the Fourteenth Amendment of said Constitution of the United States.

The respondent, Erie Railroad Company, therefore prays that the judgment aforesaid may be reversed, annulled and for nothing holden and that it may be restored to all things which it may have lost by occasion of said judgment.

COLLINS & CORBIN,
Attorneys of Respondent.

55 [Endorsed:] New Jersey Court of Errors and Appeals. Amy L. Winfield, Appellant, vs. Erie Railroad Company, a corporation, Respondent. Assignments of Error. Collins & Corbin, Att'ys of Respondent, Jersey City, N. J. Filed Jan. 14, 1916. Thomas F. Martin, Clerk.

56 UNITED STATES OF AMERICA, *ss:*

[Seal of the Secretary of the State of New Jersey.]

The President of the United States to Amy L. Winfield, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the twenty-first day of January, A. D. Nineteen hundred and sixteen, pursuant to a writ of error filed in the Clerk's Office of the Court of Errors and Appeals of the State of New Jersey, wherein Erie Railroad Com-

pany, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States of America, this 14th day of January, A. D. Nineteen hundred and sixteen.

E. R. WALKER,
Presiding Judge of the New Jersey Court of Errors and Appeals.

Attest:
THOMAS F. MARTIN, *Clerk.*

57 [Endorsed:] United States Supreme Court. Erie Railroad Company, a corporation, Plaintiff in error, vs. Amy L. Winfield, Defendant in error. Citation. Gilbert Collins and George S. Hobart, Att'ys of Pl't'ff in error, 243 Washington Street, Jersey City, N. J. Service of this Citation and receipt of a copy thereof for defendant in error is hereby acknowledged this 15th day of January, 1916. Ziegener & Lane, Att'ys of Defendant in error. Filed Jan. 15, 1916. Thomas F. Martin, Clerk.

58 In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceeding in the within entitled cause with all things concerning the same.

Witness my hand and the seal of the Court of Errors and Appeals, this Seventeenth day of January, Nineteen hundred and sixteen.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN, *Clerk.*

Endorsed on cover: File No. 25,094. New Jersey Court of Errors and Appeals. Term No. 811. Erie Railroad Company, plaintiff in error, vs. Amy L. Winfield. Filed January 20th, 1916. File No. 25,094.

OFFICE SUPREME COURT, U. S.
FILED
JAN 24 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 353

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

AMY L. WINFIELD.

MOTION TO ADVANCE.

GILBERT COLLINS,
GEORGE S. HOBART,
Counsel for Plaintiff in Error.

(25,094)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 811.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

AMY L. WINFIELD, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

MOTION TO ADVANCE.

Now comes the plaintiff in error and respectfully moves the court to advance this cause for hearing during the present term, preferably, if convenient to the court, on the 21st day of February, 1916, after the causes already assigned for argument on that date.

Statement.

This cause comes before the court by writ of error allowed by the presiding judge of the New Jersey Court of Errors and Appeals for the purpose of reviewing a decision

of said court whereby a judgment of the Supreme Court of the State of New Jersey in favor of the plaintiff in error was reversed. By chapter 95, Laws of 1911, the Legislature of the State of New Jersey enacted a statute entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder."

By section I of said statute it was provided that when personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the negligence of the employer is the proximate cause, the employee should receive compensation therefor, provided he himself was not willfully negligent; it further provided that the right to compensation under section I should not be defeated on the ground of negligence of a fellow employee or on the ground of assumption of risk—both of which grounds of defense were expressly abolished.

By section II of said statute it was enacted that when the employer and the employee should by agreement, either express or implied, accept the provisions of said section II, compensation for injuries or death by accident arising out of and in the course of employment should be made by the employer without regard to negligence of the employee, according to a certain schedule contained in said statute in all cases except when the injury or death was intentionally self-inflicted or when intoxication was the proximate cause of injury, and that said agreement should be a surrender by the parties of their rights to any other method, form or amount of compensation or determination thereof than as provided in said section II and an acceptance of all the provisions of said section, and should bind the employee and his personal representatives, widow and next of kin.

It was further provided that every contract of hiring made subsequent to the time provided for the act to take effect should be presumed to have been made with reference to

the provisions of said section II, and unless there be as a part of such contract an express statement in writing prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II were not intended to apply, then it should be presumed that the parties had accepted the provisions of section II and agreed to be bound thereby.

Said chapter 95 further provided that in case of failure to agree upon a claim for compensation either party might submit the claim to the judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case.

On October 23, 1914, while the above-mentioned statute was in effect, one David R. Winfield was in the employ of the plaintiff in error as an engineer in its Croxton Yard at Jersey City, New Jersey, and on said date was in charge of a drill engine; after finishing his work for the day he placed his engine on the ash pit in said yard, as directed by the railroad company, and while walking across the railroad tracks in said yard was struck by another engine and killed. The accident happened without negligence on the part of the railroad company or any of its officers, agents or employees.

Pursuant to said chapter 95, Laws of 1911 of the State of New Jersey, the defendant in error, Amy L. Winfield, widow of said David R. Winfield, filed with one of the judges of the Court of Common Pleas of Hudson County, New Jersey, a petition for compensation.

At the hearing of this petition it appeared without dispute that the duties of the said decedent consisted in drilling or moving with his engine freight cars in said yard, which contained both interstate and intrastate commerce.

At the said hearing plaintiff in error urged that said judge had no jurisdiction to make an award of compensation under said statute, because at the time of the accident it was engaging in interstate commerce and the said decedent was employed by it as such carrier in such commerce, and that the legal rights of the parties must be determined exclusively by the act of Congress of the United States entitled "An act

relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908.

Said judge overruled this contention and judgment was entered as above stated in favor of the defendant in error.

Thereafter plaintiff in error obtained a writ of certiorari from the Supreme Court of the State of New Jersey to review this judgment and the latter court reversed same on the authority of the case of *North Carolina R. R. Co. vs. Zachary*, 232 U. S., 248.

On appeal to the Court of Errors and Appeals that court reversed the New Jersey Supreme Court on the ground that in a case where there was no proof of negligence the said Federal act of April 22, 1908, afforded no remedy to the employee and imposed no liability on the carrier, and that therefore the judge of the Court of Common Pleas did have jurisdiction to order compensation pursuant to the New Jersey statute.

The questions involved before this court on the present writ of error are whether the said Federal statute of April 22, 1908, is exclusive of all State legislation on the subject-matter of the liability of a common carrier employer to make compensation to an employee or his representatives when at the time of the accident the carrier is engaging in interstate commerce and the employee is employed in such commerce—or whether under such circumstances the carrier is bound to make compensation under the provisions of the State law when it appears that the accident happened without negligence on the part of the carrier or any of its officers, agents, or employees; also whether said chapter 95 of the Laws of 1911 of the State of New Jersey, as construed by the Court of Errors and Appeals in this cause, violates the Federal Constitution in that by such construction it operates as a regulation of, a burden upon and an interference with interstate commerce; also whether said State statute, as thus construed, is in conflict with said Federal act of April 22, 1908, in that the purpose and intent of the contract implied in the said State statute are to enable common carriers to ex-

empt themselves from the liability created by said Federal statute; also whether said State statute, as thus construed, violates the Fourteenth Amendment of the Federal Constitution.

Reasons for Advancement.

I.

The same reasons apply in this case as recently moved the court to advance the cases of Southern Pacific Co. *vs.* Jensen (No. 700), Clyde Steamship Co. *vs.* Walker (No. 701), New York Central Railroad Co. *vs.* White (No. 761), and New York Central Railroad Co. *vs.* James Winfield (No. 762), all of which have been assigned for argument on February 21, 1916.

II.

So far as the constitutional questions above stated are concerned, they are identical with those which are presented in the four last-mentioned cases, except in so far as there may be a distinction between said four cases and the present case in that the compensation law of the State of New York is compulsory, whereas the compensation law of the State of New Jersey is elective; the questions of whether a State compensation law applies to cases where a railroad employee, who would otherwise come within the provisions of the Federal act, is injured or killed without negligence, and whether such a law, if construed to apply to such cases, violates the Federal Constitution, are the same as in the four above-mentioned cases.

III.

Many cases are pending in various courts of the State of New Jersey where claims for compensation have been made or where judgments for compensation have been entered when it appeared without dispute that the railroad was en-

gaging in interstate commerce and that the employee was employed in such commerce at the time of the accident, but wherein no negligence is or was charged. In all of these cases the same points are presented as are involved in the present case. The argument or the decision of most of these cases has been delayed pending the decision of this court in the present case, and in those cases where decisions have been made the defeated party has appealed to the next higher court pending the ultimate disposition of the present case.

IV.

Several other States have compensation laws similar to that of the State of New Jersey. The constitutionality and the application of such laws have been questioned, and the decision of this case will probably settle many of such questions raised in such other States.

COLLINS & CORBIN,
Attorneys of Plaintiff in Error.

GILBERT COLLINS,
GEO. S. HOBART,
Of Counsel.

Dated JANUARY 21, 1916.

We concur in this motion.

ZIEGENER & LANE,
Attorneys of Defendant in Error.

HARRY LANE,
Of Counsel.

[Endorsed:] Supreme Court of the United States. Erie Railroad Company, plaintiff in error, vs. Amy L. Winfield, defendant in error. October Term, 1915. No. 811. On writ of error to the Court of Errors and Appeals of the State of New Jersey. Motion to advance. Gilbert Collins, Geo. S. Hobart, att'ys of pl't'ff in error, Jersey City, N. J.

FILED
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JAMES D. MAHER
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No. 353

Supreme Court of the United States

OCTOBER TERM, 1916

ERIE RAILROAD COMPANY

Plaintiff-in-Error

vs.

AMY L. WINFIELD

Defendant-in-Error

In Error to the Court of Errors and Appeals of the State of New Jersey

On Reargument

BRIEF IN BEHALF OF ERIE RAILROAD COMPANY, PLAINTIFF-IN-ERROR

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SUBJECT INDEX.

PAGE.

Statement of the Case 1
Questions Involved 4
Specification of Errors 5

Brief of the Argument.

I.

The conclusions of the Supreme Court of New Jersey that at the time of the accident the defendant was engaging in interstate commerce and that the decedent was employed by it in such commerce were justified by the facts proved 7

A. Facts found by the New Jersey Supreme Court 7
B. Cases in support of said finding 9
C. Cases of injuries to employes while going to work 11
D. Cases of injuries to employes while returning from work 15
E. Cases on this point arising under compensation acts 18
F. In the present case finding as to interstate commerce is one of law and not of fact 22

II.

In those cases to which the Federal Employers' Liability Act is applicable it is exclusive of all proceedings under State statutes on the same subject 27

Page.

A. Cases in this Court illustrating general rule of supremacy of Federal statutes ... 27

B. Cases in this Court stating rule of supremacy of Federal Employers' Liability Act over State laws dealing with the subject matter 33

C. Specific examples of cases in this Court and elsewhere holding the Federal Employers' Liability Act to be exclusive of State laws 40

1. Under original Act of 1908 no recovery for pain before death 40
2. Under amendment of 1910 recovery allowed for pain before death 41
3. Cause of action is for benefit of relatives named in statute 41
4. No allowance for loss of future earnings in death case 41
5. Damages measured by reference to the beneficiaries 42
6. Recovery limited to relatives who are dependent 42
7. Damages apportioned among relatives named in statute 42
8. Next of kin determined by State law 43
9. No recovery if no next of kin 43
10. Future pecuniary loss must be discounted 43
11. No exemplary damages permitted .. 43
12. No recovery for loss of services, etc., caused by death of minor 44
13. Suits must be brought by personal representatives 44
14. Distribution of amount recovered .. 46
15. Limitation of actions 46

16. Non-resident aliens may maintain action 46
17. Prima facie case of negligence 46
18. No presumption of negligence 47
19. State law re fellow-servant inapplicable 47
20. Written notice of claim not required 47
21. Partial new trial permitted only in certain cases 47
22. State law as to burden of proof re contributory negligence inapplicable 48
23. State law re comparative negligence inapplicable 48
24. Evidence re contributory negligence admissible 48
25. Question of contributory negligence not controlled by former decision 49
26. Assumption of risk remains except in certain cases specified in Federal statute 49
27. Release under provisions of relief fund not a bar 50
28. State statutes limiting amount of recovery unenforcible 50

D. The exclusive nature of the Federal statute in interstate case is not affected by the title thereof 51

E. Cases dealing with the question of the right to compensation under State laws in the absence of negligence when the carrier is engaging, and the employe is employed, in interstate commerce 57

F. The Federal statute covers the same field as the New Jersey statute and is therefore exclusive of the latter 80

Page.

Summary of New Jersey Compensation Act .. 80

1. Dicta of this Court 85
2. The implications in the Federal statute 88
3. Message of the President and reports of committees 94
4. Conflict between the Federal and the New Jersey statute 97

III.

The New Jersey statute as construed by the Court of Errors and Appeals of that State in the present cause violates the Fourteenth Amendment of the Federal Constitution in that it denies to the plaintiff-in-error the equal protection of the laws and deprives it of its property without due process of law 123

A. Denial of equal protection 124

B. Deprivation of property without due process 130

IV.

The New Jersey statute as construed by the Court of Errors and Appeals of that State in the present cause is an unconstitutional regulation of and an interference with interstate commerce ... 138

V.

The judgment of the Court of Errors and Appeals of the State of New Jersey should be reversed and the judgment of the Supreme Court of that State affirmed 149

APPENDIX 150

LIST OF CASES CITED.

Page.

Adams Express Co. v. City of New York, 232 U. S. 14, 58 L. Ed. 483 ..... 29, 97

Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314 ..... 28, 147

American Radiator Co. v. Rogge, 86 N. J. L., 436 ..... 127, 142

American R. R. Co. v. Birch, 224 U. S., 547, 56 L. Ed., 879 44

Atchison, etc., Ry. Co. v. Harold, 241 U. S., 371, 60 L. Ed., 1050 ..... 29, 97

Atlantic Coast Line R. R. Co. v. Burnette, 239 U. S., 199, 60 L. Ed., 226 ..... 36, 46

Atlantic Coast Line R. Co. v. Georgia, 234 U. S., 280, 58 L. Ed., 1312 ..... 30, 97

Armbruster v. Chicago, etc., R. Co., 147 N. W., 337 (Iowa) 45

Baltimore & O. R. Co. v. Gawinski, 197 Fed., 31 115

Baltimore & O. R. R. v. Reed, 223 Fed., 689 .. 9

Baltimore & O. R. Co. v. Whitacre, 92 Atl., 1060 (Md.) 12

Barlow v. Lehigh Valley R. R., 107 N. E., 814 214 N. Y., 116 10

Battenfield v. Atchison, Topeka & Santa Fe Ry. Co., 2 Cal. I. A. C. Dec., 688 65

Baugham v. New York, etc., R. R. Co., 241 U. S., 237, 60 L. Ed., 977 49

Beamer v. Southern Pacific Co., 2 Cal. I. A. C. Dec., 737 64

Bennett v. Lehigh Valley R. R. Co., 197 Fed., 578 18

Berton v. Tietjen & Lang Dry Dock Co., 219 Fed., 763 72

Bingham v. Erie R. R. (unreported) 57

Binns v. U. S., 194 U. S., 486, 48 L. Ed., 1087 95

Birmingham v. Lehigh, etc., Co., 95 Atl., 242 155

Page.

Bishop v. Southern Pacific Co., 2 Cal. I. A. C., Dec., 749 66
Bridge v. Southern Pacific Co., 2 Cal. I. A. C., Dec., 736 65
Brooks v. Yazoo & M. V. R. Co., 72 So., 227 (Miss.) 41
Brost v. Whitall Tatum Co., 99 Atl., 315 85
Brownell Imp. Co. v. Sweeney, 223 Fed., 510 18
Burnett v. Atlantic Coast Line R. Co., 163 N. E., 186; 79 S. E., 414 (reversed on other grounds, 239 U. S., 199, 60 L. Ed., 226) .. 115
Butler v. Hildreth, 5 Mete., 49, 52 74

Campos v. Southern Pacific Co., 2 Cal. I. A. C., Dec., 747 67
Central R. Co. v. Colasurdo, 192 Fed., 901 .. 9
Central Vermont Ry. Co. v. White, 238 U. S., 507, 59 L. Ed., 1433, 35 Sup. Ct. Rep., 865 .....36, 43, 48
Chaboya v. Becker, 2 Cal. I. A. C. Dec., 958 .. 21
Charleston & W. C. Ry. Co. v. Varnville Furniture Co., 237 U. S., 597, 59 L. Ed., 1137 .....29, 97
Chesapeake & O. Ry. Co. v. Gainey, 241 U. S., 494, 60 L. Ed., 1124 43
Chesapeake & O. Ry. Co. Kelly, 241 U. S., 485, 60 L. Ed., 1117 43
Chesapeake & O. R. Co. v. Kornhoff, 180 S. W., 523 (Ky.) 10
Chesapeake, etc., Tel. Co. v. Manning, 186 U. S., 238, 46 L. Ed., 1127 95
Chicago & Alton R. R. Co. v. Wagner, 239 U. S., 452, 60 L. Ed., 379 89
Chicago & N. W. Ry. v. Gray, 237 U. S. 399, 59 L. Ed. 1018 .....10, 98
Chicago etc. Ry. Co. v. Anderson, (Unreported) 123

Page.

Chicago etc. Ry. Co. v. Devine, 239 U. S., 52; 60 L. Ed. 140 ..... 36, 50
Chicago etc. R. Co. v. Hackett, 228 U. S. 559, 57 L. Ed. 966 125
Chicago etc. R. Co. v. Hardwick Elevator Co., 226 U. S. 426, 57 L. Ed. 284 28
Chicago etc. Ry. Co. v. Industrial Board, 113 N. E. 80 68
Chicago etc. Ry. Co. v. Kindlesparker, 234 Fed. 1 10
Chicago etc R. R. Co. v. McGuire, 219 U. S., 549; 55 L. Ed., 328 125
Chicago etc. R. Co., v. Pearce, 175 S. W. 1160 (Ark.) 47
Chicago etc. R. Co. v. Wright, 239 U. S., 548; 60 L. Ed. 431 ..... 36, 48
Cicalese v. Lehigh Valley R. R. Co., 75 N. J. L., 897 17
Cincinnati etc. R. Co. v. Bonham, 171 S. W. 79 45
Cincinnati etc. Ry. Co. v. Swann, 160 Ky. 458 169 S. W. 886 49
Cincinnati etc. Ry. Co. v. Wilson, 157 Ky. 460, 163 S. W. 493 43
Connole v. Norfolk & W. Ry. Co., 216 Fed. 823 72
Corbett v. Boston & M. R. R., 107 N. E. 60, 219 Mass., 351 45
Cory v. Lake Shore etc. R. Co., 208 Fed., 847 45
Couch v. Steel, 3 El. & Bl. 402, 411, 23 L. J. Q. B. N. S. 121, 125, 2 C. L. R. 940, 18 Jur. 515, 2 Week. Rep. 170 120
Cross v. Chicago etc. R. Co., 177 S. W. 1127 (Mo.) 50
Cuebas v. Atchison, T. & S. F. Ry. Co., 3 Cal. I. A. C. Dec. 17 66
Cunningham v. Northwestern Improvement Co., 44 Mont., 180, 119 Pac., 554 132
Czerepuk v. Erie R. R. (Unreported) 57

Page.

Darr v. Baltimore etc. R. Co., 197 Fed. 665 9
De Atley v. Chesapeake & O. Ry. Co., 201 Fed. 591 90
De Biasi v. Normandy Water Co., 228 Fed. 234 46
Dewberry v. Southern Ry. Co., 175 Fed. 307 44
Donaldson v. Atchison, Topeka & Santa Fe Ry. Co., 2 Cal. I. A. C. Dec. 699..... 65
Donnelly v. Erie R. R. (Unreported)..... 57
Douglas v. United Mineral Mining Co., 2 W. C. C., 15..... 19
Dubelbeiss v. West Hoboken, 82 N. J. L. 683 24
Dunnewald v. Henry Steers, Inc., 99 Atl. 345 .....23, 136

Easter v. Virginia Ry. Co., 86 S. E. 37 (W. Va.) 16
Eastern Ry. Co. v. Ellis, 153 S. W. 701 (Tex.) 45
El Paso etc. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. Ed. 106.....14, 47, 53
Employers' Liability Cases, 207 U. S., 463, 52 L. Ed. 297.....14, 52, 56
Erie R. R. Co. v. Board of Public Utility Commrs., 85 N. J. L., 420..... 24
Erie R. R. Co. v. New York, 233 U. S. 671, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266.29, 97

Farley v. New York etc. R. R., 87 Conn. 328, 87 Atl. 890.....41, 42
Feaster v. Phila., etc. R. Co., 197 Fed. 580.... 18
Fithian v. St. Louis etc. R. Co., 188 Fed., 842 45
Flanders v. Georgia etc. Ry. Co., 67 So. 68 (Fla.) 44, 45
Flynn v. New York etc. R. R. (Unreported).. 58
Fred E. Sanders, The, 208 Fed. 724..... 71
Freeman v. Powell, 144 S. W. 1033 (Tex.).. 49
Fulgham v. Midland Valley R. R., 167 Fed. 660 .....41, 76

Page.

Gane v. Norton Hill Colliery Co., 100 L. T. 979, 2 B. W. C. C. 42 19
Garcia v. Atchison, Topeka & Santa Fe Ry. Co., 2 Cal. I. A. C. Dec. 741 67
Gee v. Lehigh Valley R. R., 148 N. Y. Supp. 882, 163 App. Div., 274 48
Graber v. Duluth etc. R. Co., 150 N. W. 489 (Wis.) 15
Grand Trunk Ry. Co. v. Knapp, 233 Fed. 950 74
Great Northern Ry. Co. v. Capital Trust Co., U. S., Adv. Ops. 1916, p. 41;
Greene v. Caldwell, 186 S. W. 648 (Ky.) 110
Griersch v. Atchison etc. Ry. Co., 158 Pac. 54 (Kan.) 45
Grigsby v. Atchison, Topeka & Santa Fe Ry. Co., 2 Cal. I. A. C. Dec. 748 67
Grow v. Oregon S. L. R. Co., 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915-B, 481 (see also 150 Pac. 970) 15
Grybowski v. Erie R. R. Co., 88 N. J. L. 1, 95 Atl., 764 (N. J. Sup. Ct.) 501
98 Atl. 1088 61
Gulf etc. Ry. Co. v. Hefley, 158 U. S. 98, 39 L. Ed. 910 27
Gulf etc. Ry. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. 785 .....40, 43
Gulf etc. R. R. v. State of Texas, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849 9

Hall v. De Cuir, 95 U. S., 485; 24 L. Ed. 547 145
Hammill v. Penn. R. R. Co., 88 N. J. L. 717, 94 Atl., 313 69
Hampton v. St. Louis etc. R. Co., 227 U. S. 456, 57 L. Ed. 596 .....28, 97
Hanson v. Lehigh Valley R. R. (Unreported) 57
Harris v. Western Pacific Ry. Co., 2 Cal. I. A. C. Dec. 697 65
Hartman v. Chicago etc. R. Co., 182 S. W. 148 (Mo.) 115

Page.

Hawkins v. St. Louis etc. R. Co., 174 S. W. 129 (Mo.) 50
Hearst v. St. Louis etc. R. Co., 188 Mo. App. 36, 173 S. W. 86..... 45
Heck v. Lehigh Valley R. R. (Unreported).. 85
Hein v. Great Northern R. Co., 159 N. W. 14 (No. Dak.)..... 45
Herring v. Atlantic Coast Line R. Co., 168 N. C. 555, 84 S. E. 863..... 115
Hills v. Pere Marquette R. R., Mich. Ind. Bd. Bul. No. 3, p. 32..... 21
Hogan v. New York Cent. R. R., 223 Fed. 890, 892 .....41, 73
Hogarty v. Phila. & R. R. Co., 245 Pa. 443, 91 Atl. 854 .....50, 115
Holt v. Akarman, 84 N. J. L., 371..... 55
Holy Trinity Church v. U. S., 143 U. S. 457, 36 L. Ed. 226..... 95
Hopkins v. Port Reading R. R., 38 N. J. Law Journal, 19 (Also see Appendix)..58, 60, 150
Horton v. Oregon etc. R. Co., 72 Wash., 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8....10, 11
Houston & Texas Ry. v. United States, 234 U. S. 342, 58 L. Ed. 1341..... 32
Howard v. Nashville etc. Ry. Co., 179 S. W. 380 (Tenn.) 45
Hulley v. Moosbrugger, 88 N. J. L. 161, 95 Atl. 1007 23
Hummer v. Henning, 2 Cal. I. A. C. Dec. 859 66
Huxoll v. Union Pacific R. Co., 155 N. W. 900 (Neb.)..... 11
Hyde v. Southern Ry. Co., 31 App. D. C., 466 50

Iannone v. New York etc. R. Co., 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730..... 18
Illinois Central R. R. v. Behrens, 233 U. S. 473, 58 L. Ed. 1051, 217 Fed. 967 .....9, 38, 69, 126, 151

Page

Illinois Central R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31 42

Ives v. Southern Buffalo Ry. Co., 94 N. E. 431; 201 N. Y., 271.....110, 130, 132

Jacobs v. Southern Ry. Co., 241 U. S. 229, 60 L. Ed. 970..... 49

James v. San Pedro, L. A. & S. L. R. R. Co., 3 Cal. I. A. C. Dec. 13..... 67

Jarvis v. Daggett, 151 Pac., 648 (Wash.)..71, 124

Jensen v. Southern P. Co., 109 N. E. 600, 215 N. Y. 514..... 69

Jones v. Charleston etc. Ry. Co., 98 S. C. 197, 82 S. E. 415..... 42

Jorgenson v. Grand Rapids etc. Ry. Co., 155 N. W. 535 (Mich.)..... 42

Kamboris v. Oregon etc. R. Co., 146 Pac. 1097 (Ore.) 45

Kansas City R. Co. v. Cooke, 100 Ark. 467, 140 S. W. 579..... 47

Kansas City Southern Ry. Co. v. Jones, 241 U. S. 181, 60 L. Ed. 943..... 49

Kansas City S. R. Co. v. Leslie, 238 U. S. 599, 59 L. Ed. 1478..... 41

Kansas City W. Ry. Co. v. McAdow, 240 U. S. 51, 60 L. Ed. 520..... 98

Karras v. Southern Pacific Co., 2 Cal. I. A. C. Dec. 748. 67

Keast v. Santa Fé Ry. Co., 2 Cal. I. A. C. Dec. 694 65

Kennerson v. Thames Tow Boat Co., 94 Atl. 372 (Conn.) 70, 143

Kepner v. U. S., 195 U. S. 100, 49 L. Ed., 114 94

Kern v. Chicago etc. Ry. Co., 201 Fed. 404.. 17

Keyport Steamboat Co. v. Farmers' Transportation Co., 18 N. J. Eq. 1 55

Kindellen v. Mt. Wash. R. Co., 76 N. H. 54, 79 Atl. 691 18

Page.

Knowles v. New York etc. R. Co., 150 N. Y. Supp. 599, 164 App Div., 711 11
Kotowski v. N. Y. etc. R. R. (unreported) 57
Krgizonski v. Erie R. R. (unreported) 57

LaCasse v. N. O. T & U. R. Co., 64 So. 1012 (La.) 45
Lambert v. Southern Pacific Co., 2 Cal. I. A. C. Dec. 743. 67
Lamphere v. Oregon etc. R. Co., 196 Fed. 336 (reversing 193 Fed. 248) 11, 18
Lauer v. No. Pac. Ry. Co., 145 Pac. 606 (Wash.) 49
Lehigh Coal Co. v. Junction 75 N. J. L. 922. 24
Librera v. Erie R. R. (unreported). 57
Lincks v. Erie R. R., 38 N. J. Law Journal, 81 (Also see appendix). 59, 60, 152
Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558. 47
Louisville & N. R. Co. v. Melton, 218 U. S. 35, 54 L. Ed. 921 125
Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. Ed. 989. 42
Louisville & N. R. Co. v. Walker, 162 Ky. 209, 172 S. W. 517. 16

McCarthy v. Southern Pacific Co., 2 Cal. I. A. C. Dec. 752. 66
McCarthy v. Southern Pacific Co., 2 Cal. I. A. C. Dec. 780. 66
McCullough v. Chicago etc., Ry. Co., 160 Ia. 524, 142 N. W. 67. 42
McDermott v. Wisconsin, 228 U. S. 115, 57 L. Ed. 754. ..... 31, 97
McGarvey's Guardian v. McGarvey's Admr., 173 S. W. 765, 163 Ky. 242 46
McGovern v. Phila. & R. R. Co., 235 U. S. 389, 59 L. Ed. 283. ..... 46, 87

Page.

McKee and others v. Great Northern Ry. Co., 42 Ir. L. T., 132; I B. W. C. C., 165 20
McNamara v. Washington Terminal Co., 35 App. D. C. 230. 115
Meehan v. Hudson & M. R. R. (unreported) 57, 60
Metcalk v. Williams, 144 Mass. 452, 454 (11 N. E. 700). 74
Michigan Central R. R. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417. ..... 34, 40, 78, 87
Middleton v. Texas, etc., Co., 178 S. W. 956 (Tex.) 110
Midland Valley R. Co. v. LeMoyne, 104 Ark. 327, 148 S. W. 654. 41
Milczarski v. Lehigh Valley R. R. (unreported). 57
Miller v. Kansas City etc., Ry. Co., 168 S. W. 336, 180 Mo. App. 371. 49
Minneapolis etc., R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961. 51
Minnesota Rate Cases, 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151 .. 140
Missouri etc., Ry. Co. v. Lenahan, 39 Okla. 283, 135 Pac. 383. 46
Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205. 32 L. Ed. 107 ..... 124, 125
Missouri etc., R. Co. v. Rentz, 162 S. W. 959 (Tex.) 11
Missouri etc. R. Co. v. U. S., 231 U. S. 112, 58 L. Ed. 144 10
Missouri etc., R. Co. v. Wulf, 226 U. S., 570; 57 L. Ed., 355 ..... 34, 44
Mobile etc., R. Co. v. Turnipseed, 219 U. S. 35, 55 L. Ed. 78 125
Montgomery v. Southern Pac. Co., 64 Ore. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13 10
Moreno v. San Pedro, Los Angeles & Salt Lake R. R. Co., 2 Cal. I. A. C. Dec. 754. 66
Morris v. Rexford, 18 N. Y. 552, 557. 74

Page.

Neil v. Idaho etc., R. Co., 22 Idaho 74, 125 Pac. 331 10
Nelson v. Illinois R. Co., 155 N. W. 169. .. 92
Newbaker v. New York etc. R. R., 38 N. J. Law Journal, 175 (Also see appendix.) 59, 60, 154
New York Cent. R. R. v. Carr, 238 U. S. 260, 59 L. Ed. 1298 9
Norfolk Southern R. R. Co. v. Perebee, 238 U. S. 269, 59 L. Ed. 1303. 48
North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591 ..... 8, 10, 35, 153
Northern Pac. R. Co. v. Maerkl, 198 Fed. 1 9
Northern Pac. R. Co. v. Meese, 239 U. S. 614, 60 L. Ed. 467, ... 117
Northern Pac. R. Co. v. Washington, 222 U. S. 370, 56 L. Ed. 237 ..... 28, 97
Northwestern Packet Co. v. McCue, 17 Wall. 508, 21 L. Ed. 705. 18

Oberlin v. Oregon etc. R. Co., 142 Pac. 554 (Ore.) 49
O'Brien v. Boston etc. R. Co., 138 Mass. 387, 52 Am. Rep. 279 18
Osborne v. Gray, 241 U. S. 16, 60 L. Ed. 865. ..... **37**

Padgett v. Seaboard Air Line R. Co., 236 U. S. 668, 59 L. Ed. 777 (affirming 99 S. C. 364, 83 S. E. 633). 12
Passaic, The, 204 Fed. 266 108
Pecos and Northern Ry. v. Rosenbloom, 240 U. S. 439, 60 L. Ed. 730. 44
Pedersen v. D. L. & W. R. R., 229 U. S. 146, 57 L. Ed., 1125 9
197 Fed., 537 18
Peck v. Boston & M. R. Co., 223 Fed. 448 73
Peet v. Mills, 76 Wash. 437, 136 Pac. 685 .. 117
Pennsylvania Co. v. Donat, 239 U. S. 50; 60 L. Ed. 139. 9

Page.

Penny v. New Orleans etc. R. Co., 66 So. 313, 135 La. 962 45
Perry v. Illinois Central R. R., 143 N. W. 724 (Minn.) 10
Phila. etc. R. R. Co. v. Schubert, 224 U. S. 603, 56 L. Ed. 911 ..... 86, 89, 114
Phila. etc. R. Co. v. Tucker, 35 App. D. C. 123, 220 U. S. 608 55 L. Ed. 607 .. 12, 14
Pittsburg etc. R. Co. v. Glinn, 219 Fed. 148 9
Pittsburg etc. Ry. v. Sheets, 15 Ohio Circuit Ct. Rep. (N. S.) 305; (affirmed 87 Ohio State 476; 102 N. E. 1129) 50, 61
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. Ed. 713. ..... 123, 124
Pomfret v. Lancashire & Yorkshire Ry Co., 19 T. L. R., 649; 5 B. W. C. C., 22 19
Potter v. Baltimore & O. R. Co., 37 Wash. L. R. 466. 115
Pub. Service Gas Co. v. Board of Pub. Util. Commrs., 84 N. J. L. 463; reversed 87 N. J. L. 581; 92 Atl. 606; affirmed on rehearing on opinion of Supreme Court, 95 Atl. 1079; see also 95 Atl., 127 24

Re Forde Opinions Solicitor of Dept. of Labor 309. 21
Re Schroeb, Vol. 1, No. 7, Bul. Ohio Comm., p. 132. 21
Rich v. St. Louis etc. R. Co., 166 Mo. App. 379, 148 S. W. 1011. 45
Rief v. Great Northern R. Co., 126 Minn. 430, 148 N. W. 309. 115
Rousaville v. Central R. Co., 37 N. J. Law Journal, 295 ..... 58, 91, 112
87 N. J. L. 371; 94 Atl., 392 58, 60, 69, 75, 106, 132, 142

San Antonio etc. R. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110. 118

Page.

Sandberg v. San Pedro, Los Angeles & Salt Lake R. R. Co., 2 Cal. I. A. C. Dec. 694 65
San Pedro etc. R. Co. v. Davide, 210 Fed. 870 17
Savage v. Jones, 225 U. S. 501, 56 L. Ed. 1182 ..... 30, 31, 33, 89, 97
St. Bernard Cypress Co. v. Johnson, 222 Fed. 246 18
St. Louis etc. R. Co. v. Brothers, 165 S. W. 488 (Tex.) 15
St. Louis etc. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93. 41
St. Louis etc. Ry. Co. v. Craft, 237 U. S. 648, 59 L. Ed. 1160 ..... 35, 41, 95, 102
St. Louis etc., Ry. Co. v. Edwards, 227 U. S. 265, 57 L. Ed. 506 ..... 28, 97
St. Louis etc. R. Co. v. Geer, 149 S. W. 1178 (Tex.) 42
St. Louis etc. Ry. Co. v. Hesterly, 228 U. S. 702, 57 L. Ed. 1031 ..... 34, 40, 102
St. Louis etc., R. Co. v. Scale, 229 U. S. 156, 57 L. Ed. 1129 ..... 9, 34, 44
Schuede v. Zenith S. S. Co., 216 Fed. 566. ..... 50, 72, 146
Scott v. N. Y. etc., R. R. (unreported). .. 57
Seaboard Air Line Ry. v. Horton, 233 U. S., 492; 58 L. Ed., 1062. ..... 35, 49, 88, 90
239 U. S. 595; 60 L. Ed. 458 49
Seaboard Air Line v. Kenney, 240 U. S. 489, 60 L. Ed. 762. ..... 37, 43
Seaboard Air Line v. Koennecke, 239 U. S. 352, 60 L. Ed. 324. ..... 9, 44
Seaboard Air Line v. Renn, 241 U. S. 290, 60 L. Ed. 1006. 46
Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327 ..... 33, 85
Sells v. Atchison etc. R. Co., 181 S. W. 106 (Mo.). 45

Page.

Sexton v. Newark District Telegraph Co., 86 Atl. 451, 84 N. J. L. 85; affirmed 91 Atl. 1070, 86 N. J. L. 701 ..... 84, 113, 130

Shannon v. Boston & M. R. R., 92 Atl., 167, 77 N. H., 349..... 46

Simpson v. Shepard, 230 U. S., 352, 57 L. Ed., 1511, 48 L. R. A. (N. S.), 1151....

Sligh v. Kirkwood, 237 U. S., 52, 59 L. Ed., 835 .....32, 98

Smith v. Erie R. R. (unreported)..... 57

Smith v. Industrial Accident Comm., 147 Pac., 600.....63, 76

Snow v. Alley, 144 Mass., 546, 554, 560 (11 N. E., 764, 59 Am. Rep., 119).....73, 74

South Covington Ry. v. Covington, 235 U. S., 537, 59 L. Ed., 350..... 145

South Covington, etc., Ry. Co. v. Finan, 153 Ky., 340, 155 S. W., 742..... 46

Southern Pac. Co. v. Crenshaw, 5 Ga. App., 675, 63 S. E., 865..... 148

Southern Ry. Co. v. Crockett, 234 U. S., 725, 58 L. Ed., 1564.....88, 109

Southern Pac. Co. v. McGinnis, 174 Fed., 649 47

Southern Pac. Co. v. Pillsbury, 151 Pac., 277 .....10, 63

Southern Ry. Co. v. R. R. Co. Comm. of Indiana, 236 U. S., 439, 59 L. Ed., 661...29-38, 97

Southern Ry. Co. v. Reid, 222 U. S., 424, 56 L. Ed., 257.....28, 97

Southern R. Co. v. United States, 222 U. S., 20, 56 L. Ed., 72.....38, 119

Spannhack v. Erie R. R. (unreported)..... 57

Spokane & I. E. R. R. Co. v. Campbell, 241 U. S., 497, 60 L. Ed., 1125.....39, 118

Spratt v. Sweeney & Gray Co., 168 App. Div., 403, 153 N. Y. Supp., 505, 9 Neg. & Comp. Cas., 918..... 143

Staley v. Ill. Cent. R. R. Co., 109 N. E., 342 (Ill.) 56, 67, 68, 76, 79, 129, 141
State Journal Co. v. Workmen's Compensation Board, 170 S. W., 1166 (Ky.)..... 110
Stoll v. Pacific Coast S. S. Co., 205 Fed., 169 71

Talmadge v. New York, etc., R. R. Co. (unreported; see appendix).....59, 60, 155
Taylor v. Seabrook, 87 N. J. L., 407, 94 Atl., 339, N. J. L..... 100
Taylor v. Taylor, 232 U. S., 363, 58 L. Ed., 638 .....35, 46, 102
Taylor v. Wells Fargo & Co., 220 Fed., 796.. 115
Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 51 L. Ed., 553..... 97
Texas & Pacific Ry. Co. v. Rigsby, 241 U. S., 33, 60 L. Ed., 874.....38, 118, 119
Texas & Pac. R. Co. v. White, 177 S. W., 1185 (Tex.) 15, 50
Thomas v. Chicago & N. W. Ry. Co., 202 Fed., 766 41
Thompson v. Wabash Ry. Co., 171 S. W., 364, 184 Fed., 554..... 45
Thompson T. & W. Assn. v. McGregor, 207 Fed., 209, 124 C. C. A., 479..... 146
Thornbro v. Kansas City Ry. Co., 91 Kans., 684, 139 Pac., 410..... 50
Toledo, etc., R. Co. v. Slavin, 236 U. S., 454, 59 L. Ed., 671.....48, 49, 109
Tonselito v. New York Central R. Co., 87 N. J. L., 651, 94 Atl., 804..... 92
Troth v. Millville Bottle Works, 86 N. J. L., 558, 91 Atl., 1031..... 85
Troxell v. Delaware etc., R. R. Co., 227 U. S., 434, 57 L. Ed., 586..... 44

Vandalia R. R. Co. v. Public Service Comm. of Indiana (opinion filed Feb. 11, 1916) 30

Page.

Vaughan v. St. Louis, etc., R. Co., 177 Mo. App., 155, 164 S. W., 144..... 45
Vaught v. Virginia, etc., R. R., 179 S. W., 314 (Tenn.) 46
Vick v. N. Y. Cent., etc., R. Co., 95 N. Y., 267, 47 Am. Rep., 36..... 18
Victor Chemical Works v. Industrial Board, 113 N. E., 173 (Ill.)..... 110

Wabash R. Co. v. Hayes, 234 U. S., 86, 58 L. Ed., 1226.....35, 37, 51, 98, 99
Walde v. San Pedro, Los Angeles & Salt Lake Ry. Co., 2 Cal. I. A. C., Dec., 751..... 66
Wagner v. Chicago & Alton R. Co., 239 U. S., 452, 60 L. Ed., 379..... 115
Walker v. Clyde Steamship Co., 109 N. E., 604, 215 N. Y., 529..... 70
Walsh v. New York, etc., R. R., 173 Fed., 494 41
Warden, L. P., & Son v. Cole, 86 Pac., 464... 9
Warren v. Harmon, 15 Ohio Circuit Ct. Rep. (N. S.), 289..... 47
Waters v. Guile, Receiver of Pere Marquette R. R., 234 Fed., 532..... 74
West Jersey Trust Co., Admr., v. Phila. & Reading R. R., 37 N. J. Law Journal 108 .....58, 129
95 Atl., 753, 88 N. J. L., 102.....60, 116
Wheelihan v. Lehigh Valley R. R. (unreported) 57
Whitecraft v. Penn. R. R. Co., 36 N. J. Law Journal, 182..... 58
Whiteside v. Brawley, 152 Mass., 133, 135 (24 N. E., 1088)..... 74
Willever v. D. L. & W. R. R., 87 N. J. L., 348, 94 Atl., 595..... 10
Winfield vs. Erie R. Co., 96 Atl., 394.....155, 156
Winfield v. N. Y. Cent. R. R., 153 N. Y.

Page.

Supp., 499, 168 App. Div., 351..51, 62, 76, 93
110 N. E., 614, 216 N. Y., 284.62, 75, 91, 141
Winfree v. Northern P. R. Co., 227 U. S., 296,
57 L. Ed., 518..... 44

Yazoo, etc., R. R. v. Wright, 235 U. S., 376, 59
L. Ed., 277..... 109
Yellow Pine Co. v. Board of Assessors, 70 N.
J. L., 590, 72 N. J. L., 182..... 24
Young v. Duncan, 218 Mass., 346, 106 N. E., 1 75

Page.

Other Authorities.

Boyd's Workmen's Compensation, p. 1063, § 486 22
Bradbury's Workmen's Compensation, pp. 404-412 (2nd Ed.) 22

Central Law Journal, Vol. 82, p. 44.....91, 140
Central Law Journal, Vol. 82, p. 63.....92, 93
Central Law Journal, Vol. 82, p. 171..... 93
8 Cyc, 802 124
8 Cyc, 1061, 2 124
36 Cyc, p. 1137 55

Harvard Law Review, Feb., 1916, p. 42..... 107
Honnold Workmen's Comp., Vol. 1, pp. 362-368 .....22, 64

4 Labatt's Master & Servant, p. 4684 (2nd Ed.) 18
5 Labatt's Master & Servant, p. 5426 (2nd Ed.) 22
L. R. A., 1916-A, p. 464..... 76

9 Neg. & Comp. Cas. Ann., p. 307..... 75
9 Neg. & Comp. Cas. Ann., p. 918..... 143
N. J. Laws of 1911, p. 134.....1, 6, 80
N. J. Laws of 1913, p. 586..... 101
N. J. Laws of 1914, p. 69..... 101
N. J. Comp. Stat. 1910, Vol. 2, p. 1907..... 101
N. J. Comp. Stat. 1910, Vol. 2, p. 2260..... 102

Richey's Federal Employers' Liability, 2nd Ed., p. 48, Sec. 28..... 77
Ruegg's Employer's Liability, p. 377 (8th Ed.) 22

U. S. Doc. 5241, p. 1..... 95
U. S. Doc. 5219, p. 2..... 96
U. S. Doc. 5226, pp. 1, 3..... 95

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 353.

ERIE RAILROAD COMPANY,

Plaintiff-in-Error,

vs.

AMY L. WINFIELD,

Defendant-in-Error.

In Error to the Court of Errors and Appeals of the State of New Jersey. On Reargument

ON REARGUMENT.

BRIEF ON BEHALF OF ERIE RAILROAD COMPANY, PLAINTIFF-IN-ERROR.

1.

Statement of the Case.

The defendant-in-error (hereafter referred to as the plaintiff) as the widow of one David R. Winfield, filed a petition with one of the judges of the Court of Common Pleas in the County of Hudson and State of New Jersey to recover compensation for the death of her husband while in the employ of the plaintiff-in-error (hereinafter called the defendant) as an engineer. The petition was filed pursuant to the provisions of Chapter 95, Laws of 1911 of the State of New Jersey, providing that employers should made

compensation, without regard of negligence, to their employees, if injured, or their dependents, if killed, in cases of accident arising out of and in the course of employment.

The defendant answered that at the time of the accident it was engaging in interstate commerce, and that the decedent was employed by it in such commerce; and that therefore the legal rights of the parties were determined exclusively by the Federal Employer's Liability Act of April 22, 1908; and that consequently the Judge of the Common Pleas had no jurisdiction.

At the hearing of the petition all the facts were admitted. There was no proof of negligence on the part of the defendant, or any of its officers, agents or employees. The Judge of the Common Pleas found for the plaintiff on the ground that the decedent at the time of the accident was not engaged in a service which was part of interstate commerce. Judgment was accordingly entered in favor of the plaintiff for a certain amount calculated according to the provisions of the New Jersey statute (p. 10 of Record).

Thereupon the defendant obtained from the New Jersey Supreme Court a writ of certiorari to review the said judgment. That Court held that the Federal Act applied, and that it excluded proceedings under the State Compensation Act. The judgment of the Court of Common Pleas was therefore reversed (p. 15 of Record).

Plaintiff then took an appeal to the New Jersey Court of Errors and Appeals. That Court held that it was not necessary to determine whether the decedent was employed in interstate commerce as held by the Supreme Court, or in intrastate commerce as held by the Common Pleas, but that

for the purpose of the appeal it would assume that the conclusion of the Supreme Court as to the character of his employment was justified by the facts proved. The Court of Errors and Appeals then concluded that in the absence of proof of negligence whereby liability against the carrier was "created" under the Federal statute, the decedent's representative was entitled to recover compensation under the state law. The judgment of the New Jersey Supreme Court was, therefore, reversed and the judgment of the Common Pleas was affirmed (pp. 17-19 of Record). The defendant thereupon sued out a writ of error to this Court.

On Jan. 24, 1916, defendant submitted to this Court a motion to advance the argument of the cause.

On Jan. 31st, the motion was granted, and the case was assigned for argument on Feb. 21st, after cases already assigned for that date. Argument was had on March 1, 1916.

On Nov. 13, 1916, the Court ordered that the case be restored to the docket for reargument.

Thereafter counsel stipulated to fix the reargument for Jan. 22, 1917, and the case now comes on to be heard accordingly.

Questions Involved.

The questions involved are whether the said Federal statute of April 22, 1908, is exclusive of all State legislation on the subject matter of liability of a carrier employer by railroad to make compensation to an employee or his dependents when at the time of the accident said carrier is engaging in interstate commerce and the employee is employed by it, at such time in such commerce—or whether under such circumstances said carrier is bound to make compensation pursuant to the provisions of the State law when there is no proof that the accident was due to negligence on the part of said carrier or any of its officers, agents or employees; also, whether said Chapter 95 of the Laws of 1911 of the State of New Jersey, as construed by the Court of Errors and Appeals in this cause, violates the Federal Constitution in that by such construction it operates as a regulation of, a burden upon, and an interference with interstate commerce; also whether said State statute, as thus construed, is in conflict with said Federal Act of April 22, 1908, in that the purpose and intent of the contract implied in the said State statute are to enable such common carriers to exempt themselves from the liability created by said Federal statute; also whether said State statute, as thus construed, violates the Fourteenth Amendment of the Federal Constitution.

2.

Specification of Errors.

(1) By the judgment of said Court of Errors and Appeals the judgment of the Supreme Court of New Jersey was reversed, whereby the jurisdiction of the Hudson County Court of Common Pleas and Judge of said Court, under an Act of the Legislature of the State of New Jersey, entitled, "an Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedue of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911 (being Chapter 95, P. L., 1911), and the amendments thereof and supplements thereto, was sustained, notwithstanding the fact that at the time of the accident to plaintiff's decedent, for whose death this action was brought, the defendant, Erie Railroad Company, was engaging in commerce between the several states or territories and between the states and territories, and between the District of Columbia and the states or territories, and between the District of Columbia and the states and territories and foreign nations, and the said decedent was employed by it as such carrier in such commerce, and, therefore, the legal rights of the plaintiff and defendant are determined by the Act of Congress of the United States, entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22nd, 1908, and the amendments thereof and supplements thereto, whereas by the law of the land the said judgment ought to have been affirmed and the Hudson County Court of

Common Pleas and the Judge of said Court held to be without jurisdiction in the premises for the reason that under the provisions of the Constitution of the United States that the Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and that such Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, said statute passed by the Congress of the United States is exclusive of the remedies provided by said statute of the Legislature of the State of New Jersey, and the said Hudson County Court of Common Pleas and the Judge of said Court were therefore without jurisdiction in the premises.

2. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals, violates the Constitution of the United States because by such construction the said statute operates as a regulation of, a burden upon and an interference with interstate commerce, contrary to Article I, Section VIII, Paragraph 3 of said Constitution.

3. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals, is in violation of and in conflict with the said Act of the Congress of the United States of April 22nd, 1908, in that the purpose and intent of the contract implied in said New Jersey Act, in Section 2 thereof, are to enable common carriers to exempt themselves from the liability created by said Act of Congress.

4. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as con-

strued by said New Jersey Court of Errors and Appeals violates the Constitution of the United States in that it abridges the privileges and immunities of the defendant and deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the laws, contrary to the Fourteenth Amendment of said Constitution of the United States.

3.

BRIEF OF THE ARGUMENT.

I.

The conclusions of the Supreme Court of New Jersey that at the time of the accident the defendant was engaging in interstate commerce and that the decedent was employed by it in such commerce were justified by the facts proved.

A. Facts found by New Jersey Supreme Court.

In the opinion of the New Jersey Supreme Court, the facts were stated as follows:

> "The record shows that David R. Winfield since 1880, had been employed as an engineer by the Erie Railroad Company; that he was a switch engineer in the Bergen Yards at Croxton, New Jersey; that on the twenty-third day of October, 1914, about six forty-five in the evening, he was run over by an engine of the said respondent (defendant) and instantly killed. His duties never took him outside of the State of New Jersey. They consisted in drilling or moving with his engine freight cars containing both interstate and intrastate commerce. On the day he was

killed, he had finished his work and had taken his engine to the ash-pit. He started to go home, across the tracks of the respondent (defendant) when he was struck by a locomotive and killed" (p. 15 of the Record).

That Court then decided, on the authority of *North Carolina R. R. Co. v. Zachary*, 232 U. S., 248; 58 L. Ed., 591, that the Federal statute was applicable under such circumstances.

We submit that this conclusion was justified by the facts proved. The stipulation at the hearing before the Judge of Common Pleas shows that the engine which the decedent had been operating during the day when he was killed was a drill engine and was used to transfer cars from the yard to what is known as the "transfer station"; that after working all day he had placed his engine on the ash-pit and then left it and started to walk home across the tracks of the defendant. He was struck by another engine just after he had left his own engine (pp. 12-13). The "transfer station," where the crew of which the decedent was a member worked, is used for cars carrying less than carload lots. It was the duty of this crew to move these cars around the yard and to sort them out so that they might be conveniently taken to points on the line of the defendant or to New York City. The last thing done by the crew on the day of the accident was the sorting of these cars (p. 13). The stipulation does not show specifically that the defendant's railroad extended outside of the limits of the State of New Jersey, although the trial judge stated that the decedent was engaged in both interstate and intrastate commerce (p. 13). However, it does affirmatively appear that at least some of the cars which were drilled and sorted by the decedent's crew were taken to New York

City (p. 13). Moreover, the Court will take judicial notice of the location and extent of important lines of railroad.

Baltimore & Ohio R. R. Co. v. Reed, 223 Fed., 689;

Gulf, etc., R. R. v. State of Texas, 72 Tex., 404; 10 S. W., 81; 1 L. R. A., 849;

L. P. Warden & Son. v. Cole, 86 Pac., 464.

B. Cases in support of said findings.

If the accident had occurred while the defendant was drilling cars, containing both interstate and intrastate shipments, no question could be raised as to the application of the Federal statute.

Pedersen v. D. L. & W. R. R., 229 U. S., 146; 57 L. Ed., 1125;

St. Louis, etc., R. Co. v. Seale, 229 U. S., 156; 57 L. Ed., 1129;

Illinois Central R. R. v. Behrens, 233 U. S., 473; 58 L. Ed., 1051 (see also 217 Fed., 967);

New York Central R. R. v. Carr, 238 U. S., 260; 59 L. Ed., 1298;

Pennsylvania Co. v. Donat, 239 U. S., 50; 60 L. Ed., 139;

Seaboard Air Line v. Koennecke, 239 U. S., 352; 60 L. Ed., 324;

Central R. Co. v. Colasurdo, 192 Fed., 901;

Darr v. Baltimore, etc., R. Co., 197 Fed., 665;

Northern Pacific R. Co. v. Maerkl, 198 Fed., 1;

Pittsburgh, etc., R. Co. v. Glinn, 219 Fed., 148;

Chicago, etc., Ry. Co. v. Kindlesparker, 234 Fed., 1;

Perry v. Illinois Central R. R., 143 N. W., 724 (Minn.);

Horton v. Oregon, etc., R. Co., 72 Wash., 503; 130 Pac., 897; 47 L. R. A. (N. S.), 8;

Montgomery v. Southern Pac. Co., 64 Ore., 597; 131 Pac., 507; 47 L. R. A. (N. S.), 13;

Chesapeake & O. R. Co. v. Kornhoff, 180 S. W., 523 (Ky.);

Willever v. D. L. & W. R. R., 87 N. J. L., 348; 94 Atl., 595; see also 99 Atl., 321;

Barlow v. Lehigh Valley R. R., 214 N. Y., 116, 107 N. E., 814;

Southern Pac. Co. v. Pillsbury, 151 Pac., 277.

The accident in the present case happened just after the decedent had left his engine and was starting to walk home across the tracks in the railroad yard. If suit had been brought under the Federal statute on the theory that the accident was due to some negligence on the part of the defendant or its officers, agents or employees, we submit that under the authorities in the Federal statute would have been held applicable on the ground that the accident happened while the decedent was still "on duty."

Missouri, etc., R. Co. v. U. S., 231 U. S., 112; 58 L. Ed., 144;

North Carolina R. Co. v. Zachary, 232 U. S., 248; 58 L. Ed., 591;

Chicago & N. W. Ry. v. Gray, 237 U. S., 399; 59 L. Ed., 1018;

Neil v. Idaho, etc., R. Co., 22 Idaho, 74; 125 Pac., 331.

C. Cases of injuries to employees while going to work.

Several cases have arisen under the Federal Act wherein the employee was injured while on his way *to* work. Thus in *Lamphere v. Oregon, etc., R. Co.,* 196 Fed., 336; 47 L. R. A. (N. S.), 1 (reversing 193 Fed., 248); the Federal statute was applied to the case of a fireman who was ordered to report at a station to be transported with others to another station to relieve the crew of an interstate train; and who was killed by the negligence of another crew while he was approaching the station.

In *Missouri, etc., R. Co. v. Rentz,* 162 S. W., 959 (Texas), it was held that an engineer who was injured while on his way from his home to take his engine out of the round-house to engage in interstate commerce was within the act.

In *Knowles v. New York, etc., R. Co.,* 150 N. Y. Supp., 599; 164 App. Div., 711, an employee who was killed while riding to work on a switch engine was held within the statute.

In *Huxoll v. Union Pacific R. Co.,* 155 N. W., 900 (Neb.), an engineer was on his way to take charge of an engine which was to proceed to another point on the railroad line for the purpose of bringing in a train used in interstate commerce. In order to reach his engine he had to cross one or more tracks. While crossing a track and before he had reached his engine he was struck and killed by another locomotive. Held, that he was entitled to recover under the Federal statute.

In *Horton v. Oregon, etc., R. Co.,* 72 Wash., 503; 130 Pac., 897, a pumper employed at a pumping station for locomotives was held to come under the Federal statute when he was injured

while riding from his home to his work at the station on a small hand-car furnished by the company for that purpose.

In *Baltimore & O. R. Co. v. Whitacre*, 92 Atl., 1060 (Md.), the Federal statute was applied to the case of an employee who had reported at the railroad yard about an hour before the leaving time of his train; while he was on his way to his engine through the company's premises he was asked by the fireman to look up the "tool-boy" and get a cup, and while he was doing this he fell into a cinder pit.

In *Padgett v. Seaboard Air Line R. Co.*, 236 U. S., 668; 59 L. Ed., 777 (affirming, 99 S. C., 364; 83 S. E., 633), an engineer employed on an interstate run was killed by falling into a pit in a dark round-house where his engine was stored. Held that the jury were justified in concluding that he was engaged in interstate commerce under the Federal statute, when there was evidence from which it could be inferred that he was on his way to make an inspection of his engine, although such inspection was not necessary at the time of the accident.

In *Philadelphia, etc., R. Co. v. Tucker*, 35 App. D. C., 123; L. R. A., 1915-C, 39, a locomotive fireman was killed while crossing the railroad tracks on his way to assume his duties. There was evidence tending to show that at the time of the accident he had gone to the railroad yard for the purpose of taking a freight train known as the "Annex," which was a work train furnished by the company to carry employees to and from their work. He was struck while on the premises of the railroad, but before he had reached this train. Judgment for plaintiff was affirmed. The

Court of Appeals of the District of Columbia said:

> "It is conceded by defendant that, had Tucker reached the Annex, assuming that he had been called for freight train service, he would have been in the employ of the defendant company within the meaning of Sec. 1 of said Act of 1906, notwithstanding that technically his term of service would not have commenced until he reached the freight yards to which the Annex was to carry him. This concession is made upon the theory that he would then have been upon a conveyance provided by the master, and hence under the master's control. There are numerous cases sustaining this view. It is contended, however, that, until Tucker did reach the Annex, he was not a servant of the company within the contemplation of the act. When Tucker was killed he was upon the premises of the defendant in response to its call to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. Can it be that under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the

> servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. In the present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he entered the Annex, which was only another agency provided by the master for the accommodation of its servants."

Writ of error was taken to this Court and the judgment affirmed (220 U. S., 608; 55 L. Ed., 607).

This case arose under the original Employer's Liability Act of 1906, which had been held valid so far as applicable to the District of Columbia and the Territories (*El Paso & N. E. Ry. v. Gutierrez,* 215 U. S., 87; 54 L. Ed., 106), although invalid in so far as it related to carriers engaged in business in the states (*Employers' Liability Cases,* 207 U. S., 463; 52 L. Ed., 297).

So far as the present point is concerned the reasoning of the Court of Appeals of the District of Columbia above quoted is applicable to cases arising under the Act of 1908 to the same extent as to cases arising under the Act of 1906, as under both statutes it is necessary for a plaintiff to show that at the time of the accident upon which the suit is based the person injured or killed was in the employ of the carrier.

D. Cases of injuries to employees while returning from work.

The same rule, we submit, applies to a case of an employee who was injured while on his way home *from* work. Thus in the case of *Texas & Pacific R. Co. v. White,* 177 S. W., 1185 (Texas), the Federal statute was held to apply to the case of a section foreman who was run down while helping his crew lift their hand-car from the track while they were on their way home from work after having made certain repairs to the track of an interstate railroad. The Court said:

> "It appears that at the time of the accident in question in the present suit, White and his crew were still in the employment of the defendant company. The return trip to Loraine, his headquarters, was as much an incident to and a part of the work of repairing the broken rail as was the outgoing trip to perform that service."

In *St. Louis, etc., R. Co. v. Brothers,* 165 S. W., 488 (Texas), an employee who was riding on a pass on his way home from work was held to come under the Federal statute.

In *Graber v. Duluth, etc., R. Co.,* 150 N. W., 489 (Wis.), a brakeman had finished his regular duties after a run between two state points on a train which had some interstate cars. He had then gone to a saloon and from there started to cross over a train to go to the station in order to see if the conductor had any further orders for him. He was injured while crossing the track. Held, that he was employed in interstate commerce.

In *Grow v. Oregon, S. L. R. Co.,* 44 Utah, 160; 138 Pac., 398, Ann. Cas., 1915-B, 481 (see also 150 Pac., 970; decision after retrial), held that

an employee who was engaged in installing a block signal system was under the protection of the Federal statute when he was killed while being conveyed on a railway tricycle from his work to a boarding car at the end of the day's work.

In *Easter v. Virginia Ry. Co.*, 86 S. E., 37 (W. Va.), a brakeman was employed on an interstate train, and after the train reached its destination he spent about an hour in the caboose to wash and to change his clothing. He then started for his boarding house and while crossing a track in the railroad yard was struck by a locomotive. Held, that he was under the protection of the Federal statute.

In *Louisville & N. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517, a laborer who was employed in repairing a trestle on the line of an interstate carrier, used in interstate commerce, was held to be within the Federal statute where at the end of his day's work he was killed while walking on the track to boarding cars located about a mile from the place where he had been working during the day. The Court said:

> "At the time of his death he was either an employee engaged in interstate commerce or he was a mere licensee using the tracks of the company in going from his place of work to the boarding car. It is very clear that while actually engaged at work for the company he was an employee engaged in interstate commerce, and we think it equally clear that the moment his day's work ended he was not thereby converted into some other kind of an employee, but that he either retained his character as an interstate employee, or became, when his work ended, and while going to the boarding car under the circumstances stated, a licensee. After giving to this question careful consideration our opinion is that in going from his place of work to

his boarding car he continued in the character of an employee of the company engaged in interstate commerce.

* * * * *

"And so we think that under these circumstances an employee such as Walker was, should be treated as engaged in interstate commerce, not only when actually employed at his work, but while using the premises of the company in going to and from the place set apart for him to eat and sleep and his work on the premises of the company. In other words, within the contemplation of the act, the course of his employment covered, not only the time he was actually engaged at work, but the time he was engaged in going to and from his work."

In *Kern v. Chicago, etc., Ry. Co.*, 201 Fed., 404, the plaintiff was injured while returning at night from his work to a construction camp on a hand-car furnished by the railroad for that purpose. The case was treated as arising under the Federal statute.

In *San Pedro, etc., R. Co. v. Davide*, 210 Fed., 870, it was held that a railroad section hand who had been engaged in interstate commerce during the day was still so engaged while riding home on a hand-car furnished by the company, at the conclusion of his day's labor.

The case of *Cicalese v. Lehigh Valley R. R. Co.*, 75 N. J. L., 897, did not arise under the Federal statute, but the principle is applicable: it was held that where the carrier provided hand-cars to transport its employees from the place of work to their homes, even if the journey is commenced after the usual work of the day has ceased, the relation of master and servant continues until the employee has reached his destination.

To the same effect see:

Northwestern Packet Co. v. McCue, 17 Wall 508; 21 L. Ed. 705;

St. Bernard Cypress Co. v. Johnson, 222 Fed., 246;

Brownell Imp. Co. v. Sweeney, 223 Fed., 510;

Kindellen v. Mt. Wash. R. Co., 76 N. H. 54; 79 Atl., 691;

Iannone v. New York, etc., R. Co., 21 R. I., 452; 44 Atl., 592; 46 L. R. A., 730;

Vick v. N. Y. Cent., etc., R. Co., 95 N. Y., 267; 47 Am. Rep., 36;

O'Brien v. Boston, etc., R. Co., 138 Mass., 387; 52 Am. Rep., 279;

4 Labatt's Master and Servant, 4684 (2nd. Ed.), and cases cited.

Counsel for plaintiff may cite the cases of *Bennett v. Lehigh Valley R. Co.,* 197 Fed., 578, and *Feaster v. Philadelphia, etc., R. Co.,* 197 Fed., 580, where the District Judge held that employees were not engaged in interstate commerce while going to or from their work on a train by permission of the company. The decision in each case, however, was based on the authority of the *Pederson* case in 197 Fed., 537, which was afterwards reversed by this Court, and also of the *Lamphere case,* 193 Fed., 248, which was afterwards reversed by the Circuit Court of Appeals for the Ninth Circuit. (See 196 Fed., 336.)

E. Cases under compensation acts.

In the respect now under consideration, the present case is analogous to cases arising under compensation acts wherein it is held that an injured employee is entitled to receive compensation if injured on the employer's premises

while on his way home from work, even though the actual work of the day has been finished before the accident.

The following are illustrative cases arising under the English Workmen's Compensation Act, in which there was a provision similar to that found in practically all of the state statutes, namely, that compensation is to be made for injuries "by accident arising out of and in the course of employment"; in each of them the injured employee was held to be entitled to receive compensation.

In *Douglas v. United Mineral Mining Co.,* 2 W. C. C., 15, a miner, having finished his day's work started to leave the mine by means of a cage in the sump shaft. When the cage was near the top of the shaft the employee who was operating the engine pulled the wrong lever and the cage fell down and the miner was killed. His representative was held entitled to compensation although another method of leaving the mine had been provided.

In *Pomfret v. Lancastershire & Yorkshire Ry. Co.*, 19 T. L. R., 649; 5 B. W. C. C., 22, a railroad employee booked off every evening at Newton Heath Station, and he had the right when he had finished his day's work to travel by any train going to Newton Heath from the place where he left his engine. While travelling by such a train from Charleston Station he fell from the railroad coach in which he was riding and was killed—no explanation being given as to how he happened to fall. Held, the accident arose out of and in the course of the employment.

In *Gane v. Norton Hill Colliery Co.,* 100 L. T., 979; 2 Butterworth W. C. C., 42, an employee after finishing his work at a colliery started to

go home across some railroad tracks which were on the premises and under the control of the employer; and while so doing was injured by the movement of certain trucks on the railroad. He was held entitled to receive compensation.

Cozens-Hardy, M. R., said:

> "What was the duty of the applicant? What was really the implied term of his employment? That he should when his day's work was over, without loitering and with all reasonable speed, leave the colliery premises by the accustomed and permitted route. That is what he did. It was in the course of that departure that the accident happened. I feel myself bound to say that in point of law this accident which happened in the immediate neighborhood of the pit's mouth, close to the screen on the colliery premises, was an accident which happened 'in the course of' applicant's employment— the course of his employment plainly not being at one end to the moment when he reaches the place where he is to do his work, or at the other end to the moment when he comes up from the pit's mouth. It must include a reasonable interval of time and of space during which the employment lasts."

In *McKee and others v. Great Northern Railway Co.*, 42 Ir. L. T., 132; 1 Butterworth W. C. C., 165, a railroad employee took a short cut home and was killed by a train while on the premises of the employer. Held, the accident arose out of and in the course of the employment.

FitzGibbon, L. J., said:

> "I think a man's employment does not cease until he leaves his employer's premises * * * The injury which occurred in this case is a risk inherent and incidental to any employment in which a person is obliged to walk through premises where shunting takes place. * * * I have no

> doubt that the evidence supports the finding that the man was going home by a short cut, and the injury arose out of his employment."

These principles have been applied to several cases considered by State Compensation Bureaus or Commissions. Thus, in *Hills v. Pere Marquette R. R.,* Michigan Industrial Board, Bul. No. 3, p. 32, an employee was struck by a railroad train while on his way home from dinner. He had quit work for the forenoon and was going home across the railroad yard when he was struck. Held, that at the time of the accident he was still in the employ of the railroad and his dependents were therefore entitled to compensation.

An employee who was injured after he had finished work for the day and was preparing to leave the premises, and while walking to the place, on the premises, where his coat and hat were hanging, was held entitled to compensation. *Re Schroeb,* Vol. 1, No. 7, Bul. Ohio Commission, p. 132.

An employee who was injured, after the close of the day's work, by the swinging door of the main entrance to a building, on the fourth floor of which she worked, was held entitled to compensation. *Chaboya v. Becker,* 2 Cal. I. A. C., Dec. 958.

A watchman returning from work was injured after alighting from a labor train, while walking on the adjacent track—which was the only way of reaching the highway reaching to his home. It was held that he was entitled to compenation under the Federal Compensation Act. Re Forde: Opinions Solicitor of Department of Labor, 309.

The general rule on the subject is summarized as follows in a recent work on the subject:

> "The employment covers not only the time during which the workman is engaged in his ordinary labor, but also a later time during which he is passing from the surroundings of his employment into surroundings unrelated thereto."
>
> Honnold Workmen's Compensation, Vol. 1, p. 363.

Other cases on the point will be found collated in the following text books:

> Boyd's Workmen's Compensation, p. 1063 §486;
>
> Bradbury's Workmen's Compensation, pp. 404-412 (2nd Ed.);
>
> Ruegg's Employer's Liability, p. 377 (8th Ed.);
>
> 5 Labatt's Master & Servant, p. 5426 (2nd. Ed.);
>
> Honnold Workmen's Comp., Vol. 1, pp. 362-368.

F. Finding as to interstate commerce in the present case one of law and not of fact.

It may be urged that the finding of the Judge of the Common Pleas that the decedent was not engaged in interstate "service" at the time of the accident is conclusive by virtue of the provisions of Section 18 of the New Jersey Compensation Act, which reads as follows:

> "In case of a dispute over, or failure to agree upon, a claim for compensation between employer and employee, or the dependents of the employee, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or

> where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding."

The findings of the Common Pleas are expressed in the form of a "Determination" (pp. 9 and 10 of the Record). An examination thereof will show that the facts as to the nature of the employment of the decedent are given in paragraphs three and four of the Determination (pp. 9, 10). But whether the decedent at the time of the accident was engaged in interstate commerce is, we submit, a conclusion of law to be drawn from the facts. The facts being undisputed, the Judge of the Common Pleas could not find *as a matter of fact* that the decedent was not engaged in interstate commerce. The facts found by him could extend only to the actual physical acts performed by the decedent; whether by reason of such acts he was employed in interstate commerce is a conclusion of law.

The Supreme Court on the same undisputed facts came to a different conclusion of law. The Supreme Court had both the right and the duty to determine from the facts what was the legal conclusion to be derived therefrom. The New Jersey Court of Errors and Appeals has recently had occasion to consider Section 18 of the Compensation Act in the case of *Hulley v. Moosbrugger* 88 N. J. L. 161, 95 Atl., 1007. This case held that although the findings of the Common Pleas as to the facts are conclusive on appeal, nevertheless "the law arising upon the ascertained facts is a question for the court reviewing the decision". To the same effect see *Dunnewald v. Henry Steers,* Inc., 99 Atl. 345. It therefore fol-

lows that the findings of the Common Pleas Judge are not "conclusive and binding" if the judge of that court has made a mistake of law upon the "ascertained" facts.

In the present case there was no dispute as to the facts. Hence, the finding of the Judge of Common Pleas that the decedent was not employed in interstate service at the time of the accident is not conclusive but was a proper subject matter of review by the New Jersey Supreme Court. The latter court found that the decedent was engaged in interstate commerce. If this finding of the Supreme Court is to be considered as a finding of law it is, of course, a subject for review by the New Jersey Court of Errors and Appeals or by this Court. On the other hand, if the finding of the Supreme Court on this point be considered as a finding of fact then under the New Jersey practice such finding of fact is conclusive, for the reason that (as repeatedly held in New Jersey) the conclusions of the Supreme Court, on certiorari to review the decision of statutory tribunals (as in this case, a Judge of the Court of Common Pleas) are final if there be any evidence to sustain them.

Lehigh Coal Co. v. Junction, 75 N. J. L. 922;

Yellow Pine Co., v. Board of Assessors, 70 N. J. L., 590; 72 N. J. L., 182;

Dubelbeiss v. West Hoboken, 82 N. J. L., 683;

Erie R. R. Co. v. Board of Public Utility Commrs., 85 N. J. L., 420;

Public Service Gas Co. v. Board of Public Utility Commrs., 84 N. J. L., 463; reversed 87 N. J. L., 581; 92 Atl., 606; affirmed on rehearing on opinion of

Supreme Court 95 Atl., 1079; see also 95 Atl., 127.

It may be urged by the plaintiff that the burden of proof was on the defendant to show that at the time of the accident the plaintiff was engaged in interstate commerce. We do not concede that such is the rule. The plaintiff alleges a right to recover compensation under the New Jersey statute. One of the essential points to be established in order to entitle the plaintiff to recover is that at the time of the accident the decedent was engaged in *intra*state commerce; if that fact does not appear, then if our contention is correct that the Federal statute is exclusive, the plaintiff's case must fail because one of the essential elements of the right to recover has not been shown.

But in the present case the question of burden of proof on this point is of small importance because, as shown above, the facts, so far as relate to the question of interstate commerce, were undisputed. The stipulation in the record (pp. 9 and 10) shows that the decedent was engaged indiscriminately in both interstate and intrastate commerce during the hours of his employment. Even if it were possible to pick out any single moment of the day when the car or cars which he was drilling contained nothing but *intra*state commerce, even at that moment his work of moving such cars *was in aid of interstate commerce*. The result is that it may fairly be said that the decedent was employed in interstate commerce all of the time, so long as he was actually working. The conclusion of the Common Pleas that he was not employed in interstate commerce *at the time of the accident* was based upon the admitted fact that the accident happened while he was walking home through the railroad yard. But as we have

shown above, if an employee is injured while on his home—at least while on the premises of the employer—then he is still to be considered as in the service of his employer.

If it be urged that there is no proof as to the nature of the *last* work done by the decedent, prior to the accident, the answer is that the stipulation of facts shows that the "last thing" the decedent did was to sort cars "so that they would be convenient to go out over the road or to New York City" (p. 13 of record); and the "Determination" of the Judge of the Common Pleas shows that the "last act" which the decedent did on the day of the accident, before taking his engine to the ashpit, "was the sorting of the cars which had been removed from the transfer platform where the freight was sorted so that the cars themselves would be ready to be moved on freight trains to their destinations" (p. 10 of record). The Determination further shows that these cars contained freight in less than carload lots (p. 10). Even if the particular car or cars that had last been drilled before the decedent took his engine to the ashpit did not contain a single package of interstate freight (which does not appear), in any event the drilling of the cars was in aid of interstate transportation.

We submit that, on the undisputed facts, the conclusion of the New Jersey Supreme Court that as a matter of law the defendant at the time of the accident was engaging in interstate commerce, and the decedent was employed by it in such commerce, is justified. The question still remains whether, when there is no proof of negligence, the dependents of the decedent are entitled to receive compensation under the state law, or must be remitted to whatever remedy may exist under the Federal Act.

II.

In those cases to which the Federal Employers' Liability Act is applicable it is exclusive of all proceedings under state statutes on the same subject.

In those matters in which the Congress of the United States and the Legislatures of the states have concurrent jurisdiction, it is elementary that the state may legislate until such time as the Federal Congress acts upon the subject. When the latter event occurs all state legislation must yield.

With respect to the particular question of interstate commerce, it is also settled that the power of Congress to regulate the same is such that when exercised it is exclusive and supersedes state legislation on that subject.

These general statements are subject to the modification that Congress may so limit its regulation in regard to the particular subject matter as to occupy only a limited field and leave part of the subject open to other legislation on the part of the state.

A. Cases in this Court illustrating general rule of supremacy of Federal statutes.

As illustrative of cases wherein Congress was held to have exercised its power in such a manner as to cover the entire field and thereby to exclude *all* legislation by the state on the same subject, we call attention to the following:

In *Gulf, etc., Ry. Co. v. Hefley*, 158 U. S. 98; 39 L. Ed., 910, it was held that a statute of Texas imposing a penalty for failure to deliver goods on tender of the rate named in the bill of lading did not apply to interstate shipments.

for the reason that Congress had legislated upon the same "subjected matter" in the Interstate Commerce Act, whereby the published tariff rate was prescribed as the rule of compensation in such cases.

In *Northern Pacific Ry. Co. v. Washington*, 222 U. S., 370; 56 L. Ed., 237, it was held that legislation by Congress as to hours of service of railroad employees occupied the field to such an extent as to prevent state legislation on that subject.

In *Southern Ry. Co. v. Reid*, 222 U. S., 424; 56 L. Ed. 257, a statute of North Carolina requiring common carriers to transport freight as soon as received to interstate points under certain penalty for failing to do so, was held to be invalid because in conflict with the requirement of the Hepburn Act forbidding such transportation until rates had been fixed and published.

In *Chicago, etc., R. Co. v. Hardwick Elevator Co.*, 226 U. S., 426 57 L. Ed., 284, a reciprocal demurrage law of Minnesota was held invalid because Congress, by the passage of the Hepburn Act had "exerted its paramount and all-embracing authority over the subject."

In *Adams Express Co. v. Croninger*, 226 U. S., 491; 57 L. Ed., 314, it was held that the Carmack amendment to the Hepburn Act superseded all state laws upon the subject of the limitation of the carrier's liability for loss of and damage to interstate shipments.

In the cases of *St. Louis, etc., Ry. Co. v. Edwards*, 227 U. S., 265; 57 L. Ed. 506, and *Hampton v. St. Louis, etc., R. Co.*, 227 U. S., 456; 57 L. Ed., 596, a statute of Arkansas, imposing a penalty for delay in delivering cars to the consignee, was held invalid on the ground

that it had been superseded by the provisions of the Hepburn Act.

In *Adams Express Co. v. City of New York*, 232 U. S. 14, 58 L. Ed. 483, held that the provision of a municipal ordinance requiring every owner of a public express to give a bond for each vehicle licensed under the ordinance, to be conditioned for the safe and prompt delivery of all baggage and packages entrusted to the owner or driver of such "express", was invalid for the reason, among others, that Congress, by the Act of June 29, 1916 (U. S. Comp. Stat. Supp. 1911, p. 1288) had exercised its authority and had provided its own scheme of regulation in order to secure the discharge of public obligations that the business involved.

In *Erie R. R. Co. v. New York*, 233 U. S., 671; 58 L. Ed., 1149; 52 L. R. A. (N. S.), 266, the provisions in the labor law of the State of New York relating to the hours of service of telegraph operators engaged in interstate commerce were held to be void as Congress had covered the same "field" by the Hours of Service Act of 1907.

In *Southern Ry. Co. v. R. R. Commissioners of Indiana*, 236 U. S., 439; 59 L. Ed., 661, held that the state law of Indiana was superceded by the Federal Safety Appliance Act, although the requirements of the latter differed in certain details from those of the state law.

In *Charleston & W. C. Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597 59 L. Ed., 1137, a State statute providing for a penalty against the carrier for failure to pay, within forty days, a claim for damages to an interstate shipment, was held to be superseded by the Carmack Amendment.

In *Atchison etc. Ry. Co. v. Harold*, 241 U. S.

371, 60 L. Ed., 1050, held that the Carmack Amendment excluded State action in regard to the duty of carriers in interstate shipments to issue bills of lading and the responsibilities thereunder, and that therefore all questions in regard thereto must be determined by reference to said statute rathere than by reference to the local law of the State if such local law is in conflict with the said statute.

An illustration of a case where the State Law was sustained is *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 58 L. Ed. 1312, where this court upheld the State Law requiring locomotives engaged in interstate commerce to be equipped with electric headlights of a certain candle-power —the decision being on the ground that Congress had not as yet established any regulations as to that subject.

Probably a different result would now be reached in a similar case in view of the Act of March 4, 1915 (ch. 169, 38 Stat. 1192) amending the Act of February 17, 1911, whereby the provisions of the former act were extended to the entire locomotive and all its appurtenances. See *Vandalia R. R. Co. v. Public Service Commission of Indiana*— opinion of this court filed December 11, 1916.

In determining the question of whether or not the legislation of Congress has covered the entire field of any particular subject, it is not necessary that the statute shall expressly declare its intention to occupy the whole field; neither is it necessary for Congress to expressly prohibit any State action on the same subject.

In the case of *Savage v. Jones*, 225 U. S. 501 at p. 533, 56 L. Ed. 1182 the court said (italics ours):

"When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that *which needs must be implied is of no less force than that which is expressed.* If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power (citing cases).

"But the intent to supercede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state" (citing cases).

In the case of *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. Ed. 754, it was held that certain provisions of a statute of Wisconsin, requiring syrup and certain similar articles to be labeled, was void in so far as it interfered with the Federal Pure Food and Drugs Act, the court saying:

"While these regulations are within the power of Congress, it by no means follows that the State is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in *Savage v. Jones*, 225 U. S. 501, in which the power of the State to make regulations concerning the same subject-matter, reasonable in their terms and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the State of Indiana were held not to be inconsistent with the Food and Drugs Act of Congress. While this is true, it is equally

well settled that the State may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution" (p. 131).

In *Houston & Texas Ry. v. United States*, 234 U. S. 342, 58 L. Ed. 1341 (Schreveport Rate Case), the court said:

> "The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. * * * We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if the interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control."

In *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed.

835, the court sustained a law of the State of Florida prohibiting the sale or shipment of citrus fruits which are immature or otherwise unfit for consumption, holding that the provisions in the Federal Food and Drugs Act, relating to shipment in interstate commerce of "vegetable substances" which are in whole or in part "filthy, decomposed or putrid" did not apply to "green or immature fruit." "Therefore until Congress does legislate upon the subject, the State is free to enter the field", citing *Savage v. Jones*, 225 U. S. 401, 56 L. Ed. 1182 (p. 62).

B. Cases in this Court stating rule of supremacy of Federal Employers' Liability Act over State Laws dealing with the same subject matter.

The foregoing principles have been held applicable to congressional legislation on the subject of the liability of common carriers to their employees, and it has been repeatedly stated in cases brought under the Federal Employers' Liability Act that that Act supersedes state legislation on the same subject matter. Thus in *Second Employers Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, the court said:

> "Prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress (citing cases). The inaction of Congress, however, in no wise affected its power over the subject (citing cases). And now that

> Congress has acted, the laws of the states in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is" (citing cases) (p. 54).

In *Missouri etc R. Co. v. Wulf*, 226 U. S., 570, 57 L. Ed. 355, the Court said:

> "It is true the original petition asserted a right of action under the laws of Kansas without making reference to the act of Congress, but the court was presumed to be cognizant of the enactment of the Employers Liability Act and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject" (p. 575).

In *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed., 417, the Court said:

> "By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. * * * It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states" (p. 66).

In *St. Louis &c. Ry. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031, the Court said:

> "Coming to the merits it now is decided that the act of Congress supersedes states laws in the matter with which it deals."

In *St. Louis etc., R. Co. v. Seale*, 229 U. S., 156, 57 L. Ed. 1129, the Court said:

> "If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the national constitution."

In *North Carolina R. Co. v. Zachary,* 232 U. S., 248, 58 L. Ed. 591, the Court said:

> "In order to bring the case within the terms of the Federal statute, defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appear the Federal act governs, to the exclusion of the statutes of the state" (p. 256).

In *Taylor v. Taylor,* 232 U. S. 363, 58 L. Ed. 638, the court said:

> "We have had many occasions to declare the comprehensive and exclusive power which Congress possesses over interstate commerce."

In *Seaboard Air Line v. Horton,* 233 U. S., 492, 58 L. Ed. 1062, the Court said:

> "It is settled that since Congress by the act of 1908, took possession of the field of the employers liability to employees in interstate transportation by rail, all state laws upon the subject are superseded" (p. 501).

In *Wabash R. Co. v. Hayes,* 234 U. S., 86; 58 L. Ed. 1226, the Court said:

> "Had the injuries occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the state; in other words, the Federal Act would have been exclusive in its operation, not merely cumulative."

In *St. Louis etc. R. Co. v. Craft,* 237 U. S., 648; 59 L. Ed. 1160, the Court said:

> "By the common law, the death of the human being although wrongfully caused, affords no basis for a recovery of damages, and a right of action for personal injuries dies with the person injured" (citing cases).
>
> "Therefore, in cases like this, the right of recovery depends entirely upon statute law. Here the state statute is not applicable because superseded, as respects the class of cases to which this one belongs, by the Federal Employers Liability Act" (p. 655).

In *Chicago etc. R. Co. v. Devine*, 239 U. S. 52; 60 L. Ed. 140, a motion to affirm a judgment in favor of the employee was granted on the ground that the propositions advanced in support of the writ of error were so wanting in substance as not to require further argument. One of these propositions was that the state statute limiting the amount or recovery was controlling, although the suit was under the act of Congress. On this point the Court said:

> "And the same conclusion is necessary as to the second, because in substance and effect the want of merit in that proposition has, by necessary intendment, been so conclusively established by the previous decisions of this court concerning the exclusive operation and effect of the employers liability act over the subject with which it deals as to exclude all ground for the contention which the proposition makes."

In *Atlantic Coast Line R. R. Co. v. Burnette*, 239 U. S., 199; 60 L. Ed. 226, the Court said:

> "In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont R. Co. v. White*, 238 U. S. 507, 511; 59 L. Ed., 1433, 1436; 35 Sup. Ct.

Rep. 865. But, irrespective of the fact that the act of Congress is paramount, when a law that is relied on as a source of an obligation in tort sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. * * * * * * At all events, the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source."

In *Chicago etc. Ry. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, the Court said:

"As the injuries resulting in the intestate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the Employers' Liability Act of Congress, c. 149, 35 Stat. 65, c. 143, 36 Stat. 291, and as that act is exclusive and supersedes state laws upon the subject, it was error to submit the case to the jury as if the state act were controlling. *Wabash R. R. v. Hayes*, 234 U. S. 86, 89, and cases cited."

In *Seaboard Air Line v. Kenney*, 240 U. S. 489, 60 L. Ed. 762, the Court said:

"There can be now no question that the act of Congress in so far as it deals with the subjects to which it relates is paramount and exclusive. It is therefore not disputable that recovery under the act can be had alone in the mode and by and for the persons or class of persons in whose favor the law creates and bestows a right of action."

In *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865, the Court said:

"If it had been shown that the injury had been received in interstate commerce, the defendants would have been entitled to insist upon the applicable Federal law as the ex-

clusive measure of their liability, and they would not have lost this right merely because the plaintiff had seen fit to present the claim, 'in an alternative way,' by means of separate counts."

In *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, the Court said:

"But we are unwilling to place the decision upon so narrow a ground, because we are convinced that there is no constitutional obstacle in the way of giving to the act in its remedial aspect as broad an application as was accorded to its penal provisions in *Southern R. Co. v. United States, supra*. In addition to what has been quoted from the opinions in that case and the Behrens Case the following considerations are pertinent. In the exercise of its plenary power to regulate commerce between the states, Congress has deemed it proper for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded. *Southern R. Co. v. Railroad Commission*, 236 U. S. 439; 59 L. Ed. 661, 35 Sup. Ct. Rep. 304. Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the states to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the consequences that follow a breach of the law are vital and integral to its effect as a regulation of conduct; liability to private suit is or may be as potent a deterrent

as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the states is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured to interstate commerce,—a discrimination certainly not required by anything in the Constitution,—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several states, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the act as a regulation of commerce between the states that it is within the constitutional grant of authority over that subject."

In *Spokane & I. E. R. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, the court said:

"Plaintiff-in-error refers to the fact that the wreck occurred in Idaho, and cites two sections of the Criminal Code of that state, one rendering a wilful violation or omission of duty on the part of one in Campbell's posi-

tion, whereby human life or safety is endangered, punishable as a misdemeanor; the other making wilful or negligent conduct which causes a collision of trains, and the resulting death of a human being, a criminal offense. 2 Idaho Rev. Codes Sections 6926, 6909. Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield." (Citing cases.)

C. Specific examples of cases in this court and elsewhere holding the Federal Employers' Liability Act to be exclusive of State laws.

The principles stated in the quotations from the cases in this court cited under (B) have been applied both by this and other courts to a variety of circumstances. We call attention to these as bearing on the point that it was the purpose of Congress to cover the subject matter not merely of the right of servants of common carriers by railroad to recover damages in cases of negligence, but the entire field of liability by such carriers when engaging in interstate commerce to their employees when employed in such commerce.

1. The Federal statute of 1908 limits the recovery in the event of death to the pecuniary damage sustained by the widow or the next of kin named in the statute, and does not permit a recovery for the pain suffered by the injured employee before death, although under the State Law such recovery might be had.

St. Louis etc. Ry. Co. v. Hesterly, 228 U. S. 702; 57 L. Ed. 1031;

Michigan Central R. R. v. Vreeland, 227 U. S. 59; 57 L. Ed. 417;

Gulf etc. Ry. Co. v. McGinnis, 228 U. S. 173; 57 L. Ed. 785;

Fulgham v. Midland Valley R. R., 167 Fed. 660;
Walsh v. New York etc. R. R., 173 Fed. 494;
Farley v. New York etc. R. R., 87 Conn. 328; 87 Atl. 890.

2. Under the amendment of April 5, 1910, the personal representatives of a deceased employee may recover damages not only for pecuniary loss, but also for the pain and suffering of the decedent, during the period of his survival after a fatal accident, without regard to the provisions of any State statute on this subject.

St. Louis etc. Ry. Co. v. Craft, 237 U. S. 648, 59 L. Ed. 1160;
Kansas City S. R. Co. v. Leslie, 238 U. S. 599, 59 L. Ed. 1478;
Great Northern Ry. Co. v. Capital Trust Co., U. S. Adv. Opns. 1916, p. 41;
Brooks v. Yazoo & M. V. R. Co., 72 So. 227, (Miss);
Midland Valley R. Co. v. LeMoyne, 104 Ark. 327, 148 S. W. 654;
St. Louis etc. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93.

3. The cause of action under the amendment of 1910 does not survive for the benefit of the estate of the decedent but only for the benefit of the relatives named in the act in the order specified, and if no such relatives survive, no right of recovery is given by the amendment.

Thomas v. Chicago & N. W. Ry. Co., 202 Fed. 766;
Hogan v. New York Cent. R. R., 223 Fed. 890, 892.

4. Under the Federal Act no allowance can

be made for loss of future earnings of a deceased employee in the event of his subsequent death by reason of an accident, although under the State law such allowance could be made.

Jorgenson v. Grand Rapids etc. Ry. Co., 155 N. W. 535 (Mich.).

5. The damages must be measured by reference to the beneficiaries named in the statute, and it is error to permit the jury to find such sum as will compensate the *estate*.

Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. Ed. 989;

Farley v. New York etc. R. Co., 87 Conn. 328, 87 Atl. 990;

McCoullough v. Chicago etc. Ry. Co., 160 Ia. 524, 142 N. W. 67;

Illinois Central R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

6. In any case to which the Federal Act applies the right of recovery is limited to those relatives who are "dependent"; and if there are no such relatives than no recovery can be had, even though the statute of the State gives a right of action in favor of relatives whether dependent or not.

Jones v. Charleston etc. Ry. Co., 98 S. C. 197, 82 S. E. 415.

7. The damages must be apportioned among the relatives named in the Federal statute and in the order in which they are named therein—the first class excluding the second class, etc., regardless of any provisions of the State law on the subject.

St. Louis etc. R. Co. v. Geer, 149 S. W. 1178 (Tex.).

8. The beneficiaries entitled to recover damages in the event of the death of an employee are limited to those named in the Federal statute; but there being no definition of "next of kin" in such statute the determination of the question of who are the next of kin is left to the State law.

Gulf etc. Ry. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. 785;
Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433;
Seaboard Air Line v. Kenney, 240 U. S. 489, 60 L. Ed. 762.

9. But if there are no next kin then there can be no recovery under the Federal statute.

Cincinnati etc. Ry. Co. v. Wilson, 157 Ky. 460, 163 S. W. 493.

10. In an action brought under the Federal statute the measure of damages must be settled according to the general pricinples of law as administered in the Federal Courts, and therefore in determining the pecuniary loss sustained by the beneficiaries of a deceased employee the amount of the future benefits should be discounted so as to make the verdict equivalent to the present value thereof, even though under the State law the verdict is to be determined without such discount.

Chesapeake & O. Ry. Co. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117;
Chesapeake & O. Ry. Co. v. Gainey, 241 U. S. 494, 60 L. Ed. 1124.

11. In an action to which the Federal statute applies the measure of damages, in case of accidents resulting in death, is controlled solely by that statute, to the exclusion of a State statute

permitting exemplary damages to certain dependents as well as damages for the pecuniary loss sustained by them.

Seaboard Air Line v. Koennecke, 239 U. S. 352; 60 L. Ed. 324.

12. The Federal statute covers every case of wrongful death, whether of an adult or a minor, and therefore supersedes a State law giving a right of action to the parent to recover damages for mental pain and suffering and loss of services caused by wrongful death of his minor child.

Flanders v. Georgia etc. R. Co., 68 Fla. 479, 67 So. 68.

13. Suits under the Federal Act for damages by reason of accidents resulting in death must be brought by the personal representative of the decedent, as required by that Act, and cannot be brought in the name of the widow or other beneficiaries, although the law of the State or territory permits or requires such actions to be thus brought.

American R. R. Co. v. Birch, 224 U. S. 547, 56 L. Ed. 879;

Missouri etc. Ry. Co. v. Wulf, 226 U. S. 570; 57 L. Ed. 355;

Troxell v. Delaware etc. R. R. Co., 227 U. S. 434; 57 L. Ed. 586;

Winfree v. Northern P. R. Co., 227 U. S. 296, 57 L. Ed. 518;

St. Louis etc. Ry. Co. v. Seale, 229 U. S. 156; 57 L. Ed. 1129;

Pecos and Northern Ry. v. Rosenbloom, 240 U. S. 439, 60 L. Ed. 730;

Dewberry v. Southern Ry. Co., 175 Fed. 307;

Thompson v. Wabash R. Co., 184 Fed. 554;

Fithian v. St. Louis etc. R. Co., 188 Fed. 842;

Cory v. Lake Shore etc. R. Co., 208 Fed. 847;

Armbruster v. Chicago etc. R. Co, 166 Ia. 155, 147 N. W. 337;

LaCasse v. N. O. T. & U. R. Co., 135 La. 129, 64 So. 1012;

Penny v. New Orleans etc. R. Co., 135 La. 962, 66 So. 313;

Kamboris v. Oregon etc. R. Co., 75 Ore. 358, 146 Pac. 1097;

Flanders v. Georgia etc. Ry. Co., 68 Fla. 479, 67 So. 68;

Cincinnati etc. R. Co. v. Bonham, 171 S. W. 79 (Tenn.);

Howard v. Nashville etc. Ry. Co., 179 S. W. 380 (Tenn.);

Corbett v. Boston & M. R. R., 219 Mass. 351, 107 N. E. 60;

Hein v. Great Northern R. Co., 159 N. W. 14 (No. Dak.);

Griersch v. Atchison etc. Ry. Co., 158 Pac 54 (Kan.);

Eastern Ry. Co. v. Ellis, 153 S. W. 701 (Tex.);

Rich v. St. Louis etc. R. Co., 166 Mo. App. 379, 148 S. W. 1011;

Thompson v. Wabash Ry. Co., 171 S. W. 364 (Mo.);

Hearst v. St. Louis etc. R. Co., 188 Mo. App. 36, 173 S. W. 86;

Vaughan v. St. Louis etc. R. Co., 177 Mo. App. 155; 164 S. W. 144;

Sells v. Atchison etc. R. Co., 181 S. W. 106 (Mo.);

Missouri etc. Ry. Co. v. Lenahan, 39 Okla. 283, 135 Pac. 383.

14. The manner of distribution of the amount recovered in an action for death of an employee is determined by the provisions of the Federal statute and not by those of the State law.

Taylor v. Taylor, 232 U. S. 363, 58 L. Ed. 638;

McGarvey's Guardian v. McGarvey's Admr., 163 Ky. 242, 173 S. W. 765.

15. The Federal statute is controlling on the question of the limitation of time within which actions must be commenced, and hence the two year limitation provided by Section 6 supersedes the State law on that subject.

Atlantic Coast Line R. Co. v. Burnette, 238 U. S. 199, 60 L. Ed. 226;

Seaboard Air Line v. Renn, 241 U. S. 290, 60 L. Ed. 1006;

Shannon v. Boston & M. R. R., 77 N. H. 349, 92 Atl. 167;

Vaught v. Virginia etc. R. R., 179 S. W. 314 (Tenn.).

16. Under the New Jersey Compensation statute non-resident aliens cannot maintain an action. *De Biasi v. Normandy Water Co.,* 228 Fed. 234. But such action may be maintained under the Federal statute, and the latter statute is controlling on that subject. *McGovern v. Phila. & Reading R. R.,* 235 U. S. 389, 59 L. Ed. 283.

17. A State statute whereby mere proof of the existence of defects in a car establishes a *prima facie* case of negligence does not apply to a case brought under the Federal statute.

South Covington etc. Ry. Co. v. Finan, 153 Ky. 340, 155 S. W. 742.

18. A State statute creating a presumption of negligence from injuries caused by the running of a train does not apply to an action based on the Federal statute.

Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558;
Kansas City R. Co. v. Cooke, 100 Ark. 467, 140 S. W. 579.

19. A statute of a State making a railroad company liable to its employees for damages sustained in operating trains, when injury is caused by neglect of a fellow servant, is superseded by the Federal statute in all cases to which the latter statute applies.

Warren v. Harmon, 15 Ohio Circuit Ct. Rep. (N. S.) 289.

20. Provisions of a State statute requiring that written notice of the particulars of claims arising from accidents be served upon the carrier employer, are unavailable as a defense in those cases to which the Federal statute applies.

Chicago, etc., Ry. Co. v. Pearce, 175 S. W., 1160 (Ark.).

The same principle applies to a statute of a territory.

El Paso, etc., R. Co. v. Gutierrez, 215 U. S., 87; 54 L. Ed., 106;
Southern Pac. Co. v. McGinnis, 174 Fed., 649.

21. A substantive right or defense arising under the Federal statute cannot be lessened or destroyed by a rule of practice of a State court, and hence a State law permitting the Appellate Court of the State to grant a partial new trial

in which the question of damages only could be considered, does not apply to a case brought under the Federal Employers' Liability Act, unless it clearly appears that the employee was not guilty of contributory negligence and that therefore his conduct could not affect the amount of the verdict.

Norfolk Southern R. R. Co. v. Ferebee, 238 U. S., 269; 59 L. Ed., 1303.

22. The Federal law as to the burden of proof of contributory negligence controls to the exclusion of the State law.

Toledo, etc., R. R. Co. v. Slavin, 236 U. S., 454; 59 L. Ed., 671;
Central Vermont Ry. Co. v. White, 238 U. S., 507; 59 L. Ed., 1433;
Gee v. Lehigh Valley R. R., 148 N. Y. Supp., 882; 163 App. Div., 274.

23. A State act, providing that where the employee's negligence is slight and that of the employer is gross in comparison, the former's negligence shall not bar a recovery, but shall operate to diminish the damages proportionally; and that in other cases contributory negligence should remain a bar as at common law, is superseded by the Federal act, providing that the employee's negligence shall not bar a recovery in any case, but shall operate to diminish the damage proportionally in all cases, save those expressly designated by the statute.

Chicago, etc., R. Co. v. Wright, 239 U. S., 548; 60 L. Ed., 431.

24. Evidence as to contributory negligence must be received in mitigation of damages even

though not offered for that specific purpose.

Kansas City Southern Ry. Co. v. Jones, 241 U. S., 181; 60 L. Ed., 943.

25. An action brought under the Federal statute is not controlled, so far as relates to the question of contributory negligence, by a former decision in the same case in an action brought under the State law, holding that there could be no recovery by reason of contributory negligence of the employee.

Cincinnati, etc., Ry. Co. v. Swann, 160 Ky., 458; 169 S. W., 886.

26. The defense of assumption of risk remains in all cases except those where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of the employee as specified in Section 4 of the Federal statute; such defense is therefore available in suits under the Federal statute, even though it has been abolished by a State statute.

Seaboard Air Line Ry. v. Horton, 233 U. S., 492; 58 L. Ed., 1062; see also 239 U. S., 595; 60 L. Ed., 458;

Toledo, etc., R. R. Co. v. Slavin, 236 U. S., 454; 59 L. Ed., 671;

Jacobs v. Southern Ry. Co., 241 U. S., 229; 60 L. Ed., 970;

Baugham v. New York, etc., R. R. Co., 241 U. S., 237; 60 L. Ed., 977;

Oberlin v. Oregon, etc., R. Co., 142 Pac., 554 (Ore.);

Lauer v. Northern Pacific Ry. Co., 83 Wash., 465; 145 Pac., 606;

Freeman v. Powell, 144 S. W., 1033 (Tex.);

Miller v. Kansas City, etc., Ry. Co., 180 Mo. App., 371; 168 S. W., 336;

Hawkins v. St. Louis, etc., R. Co., 189 Mo. App., 201; 174 S. W., 129;
Cross v. Chicago, etc., R. Co., 177 S. W., 1127 (Mo.);
Texas & Pacific R. Co. v. White, 177 S. W., 1185 (Tex.);
Schuede v. Zenith S. S. Co., 216 Fed., 566.

27. A release given under the provisions of a relief fund does not operate as a bar to an action under the Federal law, although under the State law such release would be a bar.

Hogarty v. Phila. & R. R. R. Co., 91 Atl., 854 (Pa.).

28. In cases to which the Federal act is applicable, the provisions of State statutes limiting the amount of recovery are unenforceable.

Chicago, etc., Ry. Co. v. Devine, 239 U. S., 52; 60 L. Ed., 140;
Grybowski v. Erie R. R., 88 N. J. L., 1; 95 Atl., 764 (affirmed, 98 Atl., 1085);
Thornbro v. Kansas City Ry. Co., 91 Kan., 684; 139 Pac., 410;
Hyde v. Southern Ry. Co., 31 App. D. C., 466;
Pittsburg, etc., Ry. v. Sheets, 15 Ohio Circuit Court Report (N. S.), 305 (affirmed, 87 Ohio State, 476; 102 N. E., 1129).

It will be observed that in every case in which the fundamental question of the right to recover has been considered, the courts have uniformly held that the Federal statute supersedes the State statute on all subjects which are expressly or impliedly included within the purview of the Federal statute.

On questions of local practice, such an amendment of pleadings, rules of evidence, form of jury trial, etc., the local law of the State, where the case is tried, controls.

Wabash R. Co. v. Hayes, 234 U. S., 86; 58 L. Ed., 1226;
Minneapolis, etc., R. Co. v. Bombolis, 241 U. S., 211; 60 L. Ed., 961.

These cases do not affect the general rule laid down in the numerous other cases cited under this heading. We, therefore, submit that under these decisions it appears that it was the purpose of Congress by the Federal statute to cover the entire field of liability on the part of interstate carriers to their employees when employed in such commerce.

D. The exclusive nature of the Federal statute in interstate cases is not affected by the title thereof.

The title of the Act of 1908 is "An act relating to the liability of common carriers by railroad to their employees in certain cases." It has been suggested that from this title there may be inferred a purpose on the part of Congress to apply the statute only to those cases where there would be liability on the part of the railroad carrier by reason of negligence on its part or on the part of any of its officers, agents or employees—as distinguished from those cases where there would be no such liability because there was no such negligence.

Winfield v. N. Y. Central R. R., 153 N. Y. Supp., 499; 168 App. Div., 351.

We submit that there is no force in this sug-

gestion. The legislative and judicial history of the Federal Employers' Liability Acts shows that the expression "in certain cases" in the title of the Act of 1908 merely indicates a purpose to limit the application of the statute to cases of accidents which may occur while the railroad carrier is engaging in interstate commerce and the employee is employed in such commerce, as distinguished from those cases wherein the carrier is not engaged nor the employee so employed.

The first Federal Employers' Liability Act passed by Congress was approved June 11, 1906, Sec. 34, Statute at Large, 232, Chapter 3070. This act was reviewed by this Court in the Employers' Liability cases, 207 U. S., 463; 52 L. Ed., 297, and declared unconstitutional because its terms included all who were engaged in interstate commerce between the states—steam railroads, telegraph lines, telephone lines, express business, vessels of every kind whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc., as carriers as well as all their employees, regardless of whether the employer was engaging in, or the injured servant was employed in, interstate commerce at the time of the injury. The Court in this regard said at page 498:

> "The Act then being addressed to *all* common carriers engaged in interstate commerce, and imposing a liability upon them in favor of *any* of their employees, *without qualification or restriction as to the business in which the carriers, or their employees may be engaged at the time of the injury,* of necessity includes subjects wholly outside of the power of Congress to regulate commerce." (Italics ours.)

The Act, therefore, included *every* individual or corporation engaged in interstate commerce be-

tween the states and *all* their employees, and was held to be broader than the constitutional power delegated by the states to the National Government. The Act, however, was declared valid as to the District of Columbia, and the Territories of the United States, for the reason that Congress has plenary powers in all matters relating to such Territories. (See *El Paso, etc., R. Co. v. Guiterrez,* 215 U. S., 87; 54 L. Ed., 106.)

As to common carriers engaged in commerce between the states, the majority opinion held, that matters under the jurisdiction of the National Government, and those within the sole jurisdiction of states were so blended in the Act, that they could not be separated by the Court, and that therefore the whole Act as to common carriers and their employees engaged in commerce between the states must be held void.

This decision of the Supreme Court was handed down on January 6th, 1908. Shortly thereafter on April 22, 1908, Congress passed the so-called Second Federal Employers' Liability Act, 35 Statute at Large, 65, Chapter 149. A comparison of the two acts shows beyond any question that this later Act was passed in order to obviate the defects of the first Act, as pointed out by the decision above referred to. Following are copies of the titles and of the first section of the first and second acts set in parallel columns:

EMPLOYERS' LIABILITY ACTS.

(Act of 1906.)

An Act relating to liability of common carriers in the District of Columbia and Territories, and common carriers engaged in commerce between the States and foreign nations to their employees.

(Act of 1906.)

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several States, or between any Territory and another or between any Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia, and any State or States, or foreign nations, shall be liable to any of its employees, or in the case of his death, to his personal representative for the benefit of his widow and children, if any: if none, then for his parents: if none, then for his next of kin

(Act of 1908.)

An Act relating to the liability of common carriers by railroad to their employees in certain cases.

(Act of 1908.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia, or any of the State or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then to such employee's parents, and if none, then to the next

dependent upon him, for all damages which may result from the negligence of any of its officers, agents, employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, ways or works.	of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

It is a familiar rule in the construction of statutes that

> "For the purpose of removing ambiguities in the language of the statute it must be read with reference to all the facts and circumstances connected with its enactment, such as the history of the times, the state of the existing law, and the evils to be remedied by the new act" (36 Cyc., 11137).

As was said in *Keyport Steamboat Company v. Farmers' Transportation Company*, 18 N. J. Eq., 1, 24:

> "Circumstances known to all the public such as what the law was at the time, or what it was supposed to be, are proper to be considered in looking for the intention of the Legislature when not explicitly expressed."

In *Holt v. Akarman*, 84 N. J. Law, 371, 377, the Court said:

> "The legislative intent was to deal with all phases germane to the subject matter of the Act. To comprehend the full force and scope of it, due regard must be had to the old law, the mischief resulting therefrom, and

> the enacted legislative remedy for the eradication of the evil."

It is submitted that the expression "in certain cases" should not be construed to refer to cases where there is no liability under the Federal statute as distinguished from cases where there is liability thereunder. A comparison of the first and second Federal statutes as above set forth, in the light of the opinion of this Court in the First Employers' Liability cases, *supra*, shows that this expression refers merely to those cases where the present Federal statute is applicable as distinguished from those cases where it is not; in the latter cases the carrier may be engaged generally in interstate commerce, yet because at the time of the accident it is not actually so engaging nor the employee so employed there is no right of action under the statute. The expression simply draws a distinction between one set of facts where the carrier is engaging and the employee is employed, in interstate commerce, and another set of facts where the carrier at the time of the accident is not engaging and the employee is not employed, in interstate commerce.

The only case decided by a Court of final review, directly passing upon the point we are discussing is *Staley v. Illinois Central Railroad Company* (Supreme Court of Illinois), 268 Ill., 356; 109 N. E. Rep., 342. At page 349 the Court discusses the meaning of the phrase "in certain cases" in the title of Federal Employers' Liability Act, and says:

> "We think the phrase 'in certain cases' was inserted in this title to obviate some of the defects suggested in the title of the Act held unconstitutional in 207 U. S., 463, supra, and that the 'certain cases' was meant to limit it

to those cases where the liability arose in interstate commerce."

E. Cases dealing with the question of the right to compensation under State laws in the absence of negligence when the carrier is engaging, and the employee is employed in interstate commerce.

We have cited under subhead (C) a variety of cases wherein the Federal statute has been held to supersede the State laws in certain aspects. The question involved in the present case as to whether State compensation laws may be applied in the absence of negligence has also been under consideration.

In the courts of New Jersey there has been a difference of opinion on this point. Under the New Jersey statute the proceedings to recover compensation are instituted before the judges of the Courts of Common Pleas of the several counties. As these opinions are not reported (except in rare instances in the New Jersey Law Journal), it is difficult to procure a complete list of same. The following is a table of some of the cases in which the point was involved:

Name of Case.	County.	Date.	Result: Compensation
Hanson v. Lehigh Valley R. R. ..... (Note 1.)	Hudson	May, 1912	Allowed
Milczarski v. Lehigh Valley R. R.	Hudson	Apr., 1914	Denied
Wheelihan v. Lehigh Valley R. R.	Hudson	May, 1914	Denied
Krgizonski v. Erie R. R.	Hudson	Jan., 1915	Denied
Spannhack v. Erie R. R.	Hudson	Feb., 1915	Denied
Meehan v. Hudson & M. R. R. ..... (Note 2.)	Hudson	Feb., 1915	Denied
Smith v. Erie R. R. ..... (Note 3.)	Hudson	June, 1915	Denied
Kotowski v. N. Y., etc., R. R.	Bergen	Sept., 1915	Denied
Scott v. N. Y., etc., R. R.	Bergen	Sept., 1915	Denied
Czerepuk v. Erie R. R.	Hudson	Oct., 1915	Allowed
Librera v. Erie R. R. ..... (Note 3.)	Passaic	Jan., 1916	Allowed
Bingham v. Erie R. R. ..... (Note 3.)	Passaic	Jan., 1916	Allowed

Donnelly v. Erie R. R. (Note 3.)	Passaic	Jan., 1916	Allowed
Heck v. Lehigh Valley R. R.	Hudson	Dec., 1916	Allowed
Flynn v. N. Y., etc., R. R.	Passaic	Dec., 1916	Allowed

Note 1: Affirmed by Supreme Court on ground that plaintiff was not engaged in interstate commerce. Opinion filed Oct., 1912

Note 2: Reargument granted and compensation allowed March, 1916.

Note 3: Now pending in New Jersey Supreme Court on writ of certiorari.

In addition to the foregoing there are certain other cases in New Jersey to which attention should be called, as follows:

In *Whitecraft v. Penna. R. R. Co.*, 36 N. J. Law Journal, 182 (Camden County, May, 1913), compensation was denied.

In *West Jersey Trust Co., Admr. v. Phila. & Reading Ry. Co.*, 37 N. J. Law Journal, 108 (Mercer County, March, 1914), compensation was denied. The decision was reversed by the New Jersey Supreme Court on the authority of the *Rounsaville* case. See 88 N. J. L., 102; 95 Atl., 753. In this case an appeal was taken to the Court of Errors and Appeals. Argument was had at the February Term, 1916, but no decision has been announced.

In *Rounsaville v. Central R. R.*, 37 N. J. Law Journal, 295 (Warren County, October, 1914), compensation was denied. This decision was reversed by the New Jersey Supreme Court on the ground that the Federal statute was not applicable to cases of accidents resulting without negligence, even though the carrier was engaging and the employee was employed in interstate commerce. See 87 N. J. L., 371; 94 Atl., 392. Thereafter, an appeal was taken to the Court of Errors and Appeals. It was argued at the November Term, 1915, but no decision has been announced.

In *Hopkins v. Port Reading R. R.*, 38 N. J.

Law Journal, 19 (Union County, December, 1914), compensation was denied. The New Jersey Supreme Court affirmed the judgment by opinion filed June, 1915—not reported (for copy see Appendix). This case is now pending on appeal to the Court of Errors and Appeals, but, we are informed by counsel, has not been argued.

In *Talmadge v. New York, etc., R. R. Co.* (Sussex County, January, 1915—not reported), compensation was allowed. The case was reviewed by the Supreme Court and judgment affirmed—opinion not reported (for copy see Appendix). Thereafter, an appeal was taken to the Court of Errors and Appeals, but has not yet been argued.

In *Lincks v. Erie R. R. Co.*, 38 N. J. Law Journal, 81 (February, 1915, Hudson County), compensation was allowed on the ground that the employee was not engaged in interstate commerce. This decision was reversed by the New Jersey Supreme Court in an opinion filed July, 1915, and not reported (for copy see Appendix). Thereafter an appeal was taken to the Court of Errors and Appeals and argument was had at the June Term, 1916. No decision has been announced.

In *Newbaker v. New York, etc., R. R. Co.*, 38 N. J. Law Journal (Warren County, June, 1915), compensation was allowed on the ground that the Federal statute did not apply to the case of an accident without negligence. The report, however, shows that the Court held that the accident occurred in intrastate commerce; hence it was not necessary to pass upon the question of whether compensation should be allowed under the New Jersey statute in the case of an accident without negligence, which came within the terms of the Federal statute.

This case was affirmed by the New Jersey Supreme Court by opinion filed April, 1916—not reported (for copy see Appendix). That Court did not pass upon the question as to whether or not the accident happened in interstate or intrastate commerce, but affirmed the judgment on the authority of the decision of the Court of Errors and appeals in the case *sub judice*. An appeal was taken to the Court of Errors and Appeals, and was submitted to that court at the November Term, 1916. No decision has been announced.

It will be observed that the judges of the court of first instance have disagreed among themselves as to the application of the New Jersey statute to the case of an interstate accident arising without negligence, and some of them have given decisions on both sides of the question—indeed, in one case (*Meehan v. Hudson & M. R. R. Co.*) there is a decision on each side by the same Court. These results are not so inconsistent as they might appear, as, of course, the lower courts have been obliged to conform their decisions to the somewhat varying conclusions of the upper courts of New Jersey.

In the New Jersey Supreme Court there are likewise decisions on both sides of the question—the *Rounsaville* and *West Jersey* cases holding one way and the *Hopkins* and *Lincks* cases the other.

In the present case, the New Jersey Court of Errors and Appeals agreed with that branch of the Supreme Court which decided the first named cases. Two recent decisions of the New Jersey Supreme Court—*Talmadge* and *Newbaker*—were decided on the authority of the present case. The explanation of the varying conclusions of the New Jersey Supreme Court, when the point was first

presented to it, is no doubt found in the fact that the several cases happened to come before different branches of that court—the branches being composed of different judges.

It may be observed in this connection that another branch of the New Jersey Supreme Court, in *Grybowski v. Erie R. R.*, 88 N. J. L. 1 ; 95 Atl. 764, wherein the carrier was engaging and the employee was employed in interstate commerce, brought in the state court to recover damages by reason of an accident resulting from negligence, refused to limit the recovery to the amount fixed by the implied agreement under Section 11 of the New Jersey statute, saying (italics ours):

> "It has been held by the United States Supreme Court that the Federal Employers' Liability Act of 1908 superseded all state laws upon the subject of the liability of carriers by railroad engaged in interstate transportation, to their workmen injured while employed in such commerce (citing cases). The necessary corollary of this judicial declaration is that no state, by subsequent legislation, can impair or curtail in any degree the rights conferred upon the employee, or his personal representative, *or the liabilities imposed upon the carrier, by that statute.*"

This case was taken to the Court of Errors and Appeals and the latter court affirmed the judgment, "for the reasons expressed in the opinion delivered by Chief Justice Gummere in the Supreme Court". See 98 Atl., 1085.

A ruling similar to that in the Grybowski case was made in Ohio where it was held in the case of *Pittsburg etc., Ry. Co. v. Sheets,* 15 Ohio Circuit Court Reports (N. S.) 305 (affirmed 87 Ohio State 476; 102 N. E. 1129) that in an action

to which the Federal statute applies the carrier could not take advantage of a statute of the State providing for a benefit fund from which compensation should be made to the employee in lieu of an action for damages against the employer.

The point has also been under consideration in the New York Court of Appeals. In the case of *Winfield v. New York Central R. R.*, 216 N. Y. 284, 110 N. E. 614, that court affirmed the decision of the Appellate Division which, by a vote of three to two, had decided that compensation might be made under the New York Workmen's Act of 1914 when the accident happened without negligence, although if there had been negligence the Federal statute would then have been appliable by reason of the fact that the proofs showed that the carrier was engaging and the workmen was employed in interstate commerce at the time of the accident. See 153 N. Y. Supp. 499; 168 App. Div. 351. This case is now before this Court for review on this and other points.

The decision of the New York Court of Appeals in this case was based upon the theory that "in enacting the Federal Employers' Liability Act it (i. e., Congress) intended to occupy and exclusively preempt the field in which the liability of certain employers engaged in interstate commerce to their employees is prescribed when the latter were injured as the result of negligence." This conclusion, we submit, is the result of confusing that which is regulated with the manner in which it is regulated. What Congress regulated was the relation of master and servant when both are engaged in interstate commerce; for that purpose it provided among other things that the master should be liable if negligent and that cer-

tain defenses previously available should be abrogated in whole or in part. The language of the Federal statute, we submit, shows that the liability described thereby does not depend upon whether the employee is injured *as the result of negligence*, but upon whether he is injured while the carrier is engaging in interstate commerce and while he is employed by the carrier in such commerce.

On the other hand it has been held in California in the case of *Smith v. Industrial Accident Commission,* 26 Cal. App. 560, 147 Pac. 600 (District Court of Appeal, Second District) that the Federal statute governs the entire liability of the carrier for injuries to its employees and bars compensation under the said state law in all cases to which the Federal act is applicable, including cases of accidents not caused by negligence. The same result was reached by the Supreme Court of California in *Southern Pacific Co. v. Pillsbury,* 170 Cal 782, 151 Pac. 277. In that case it was held that an employee who was engaged to build and repair trucks for locomotives was engaged in interstate commerce within the meaning of the Federal statute when it appeared that he was injured while repairing a switch engine which was operated in a railroad yard in the handling of both inter and intrastate commerce, although at the time of the accident the engine was not actually in operation but had been withdrawn from service for the purpose of repairs. The Industrial Commission of California held that the employee under these circumstances was not engaged in interstate commerce. This conclusion was reversed and the award of the Commission annulled. The court said:

> "In this case all of the facts touching the nature of the deceased's employment, the

character and use of the instrumentality in the repair of which he was engaged at the time of his death, being beyond controversy and fairly found by the commission, the one important legal question is that of the jurisdiction of the commission to retain and consider the application for relief. Phrasing it differently, if the deceased, an employee of the petitioner, who was and is engaged as a railroad corporation in interstate as well as intrastate business, was at the time the accident befell him engaged in interstate commerce, the state commission admittedly had no jurisdiction; the jurisdiction being exclusively vested in the federal authorities by virtue of the terms and provisions of the Common Carriers' Liability Act of the United States ('An act relating to liability of common carriers by railroad to their employees in certain cases,' April 22, 1908, passed Public No. 100, c. 149, 35 Stats. U. S. 65).

"It needs no citation of authority to show that, if the case of the deceased comes within the purview of the federal act, the state accident board is without jurisdiction, and this proposition is of course conceded."

The principles announced in these California decisions have been applied to a variety of cases by the Industrial Accident Commission of that state. In the latest work on the general subject (Hornold on Workmen's Compensation—published January 1, 1917) the author cites the following decisions of that Commission wherein it was held that the California statute did not apply for the reason that the workman was injured while engaged in interstate commerce (Vol. 1. Sec. 10, p. 52, note 9):

Where an employee, working in the repair shop of a railroad engaged in interstate and intrastate business, is injured while repairing a locomotive. *Beamer v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 737.

Where a car inspector, in the employment of a railroad engaged in both interstate and intrastate commerce, was injured while coupling the air hose of a freight train carrying some cars destined for points outside the state, *Bridge v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 736.

Where a mechanic, in the employment of a railroad engaged in interstate and intrastate commerce, is injured by a fall from a locomotive upon which he is working in a roundhouse of the railroad. *Donaldson v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 699.

Where a section hand is injured while working upon the tracks of a railroad engaged in interstate and intrastate business. *Harris v. Western Pacific Ry. Co.*, 2 Cal. I. A. C. Dec. 697.

Where it appeared that the injured man was a watchman in the employ of an interstate railway, and at the time of accident was weighing freight cars of an interstate character. *Keast v. Santa Fé. Ry. Co.*, 2 Cal. I. A. C. Dec. 694.

Where it appeared that the applicant was engaged at the time of the accident in the repair of a bridge, which was a portion of the main line of an interstate railway. *Sandberg v. San Pedro, Los Angeles & Salt Lake R. R. Co.*, 2 Cal. I. A. C. Dec. 694.

Where an employee of the Santa Fé Railway was injured while engaged in the repair of a bridge used by the Sante Fé Railway in its interstate business. *Battenfield v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 688.

Where an employee of the Santa Fé Railway, while engaged in loading timbers intended for the repair of stockyards used by said railway to confine live stock shipped to and from points both interstate and intrastate, was injured by a fall-

ing timber. *Hummer v. Hennings,* 2 Cal. I. A. C. Dec. 859.

Where an employee of the Southern Pacific Company was injured while engaged in repair work on a bridge, part of the main line of the railway used in the interstate business of the defendant. *McCarthy v. Southern Pacific Co.,* 2 Cal. I. A. C. Dec. 780.

Where an employee of the Southern Pacific Company was injured while engaged in switching cars of a train, some of the cars of which were used in interstate business of the defendant. *McCarthy v. Southern Pacific Co.,* 2 Cal. I. A. C. Dec. 752.

Where it appeared that at the time of the accident the employee was a section hand, and was being carried on a hand car from one point to another on the line used for interstate commerce of the railway. *Moreno v. San Pedro, Los Angeles & Salt Lake R. R.* Co., 2 Cal. I. A. C. Dec. 754.

Where it appeared that the injured employee was at the time of the accident doing work in the construction of a bridge on a branch of a railway used for interstate traffic. *Walde v. San Pedro, Los Angeles & Salt Lake Ry. Co.,* 2 Cal. I. A. C. Dec. 751.

Where an employee of the Southern Pacific Company was injured while engaged in the repair of an engine used by the Southern Pacific in its interstate business. *Bishop v. Southern Pacific Co.,* 2 Cal. I. A. C. Dec. 749.

Where a workman was engaged in rearranging, transferring, and changing tracks used indiscriminately for interstate and intrastate commerce. *Cuebas v. Atchison, T. & S. F. Ry. Co.,* 3 Cal. I. A. C. Dec. 17.

Where a brakeman on a wrecking train, sent

to rerail an engine which was obstructing the tracks of an interstate railway, and at the time of derailment was hauling cars of interstate freight. *James v. San Pedro, L. A. & S. L. R. R. Co.*, 3 Cal. I. A. C. Dec. 13.

Where an employee of the Santa Fé Railway was injured while engaged as a brakeman in switching a railway car, such car being a foreign car loaded with freight destined to points outside this state. *Grigsby v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 748.

Where a section hand, employed by a railroad doing interstate business, is injured while working upon the repairing of railroad track. *Karras v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 748.

Where an employee of the Southern Pacific Company is injured while loading steel rails upon one of its flat cars at its terminal, the rails to be used in repairing the main line of its track. *Campos v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 747.

Where an employee of the Southern Pacific Company is injured in repairing and maintaining a trestle and roadbed. *Lambert v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 743.

Where an employee of a railroad engaged in interstate and intrastate business is injured while repairing a flat car. *Garcia v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 741.

A conclusion similar to that of the California Courts was reached by the Supreme Court of Illinois in the case of *Stanley v. Ill. Cen. R. R.* Co., 268 Ill. 356, N. E. 342 L. R. A. 1916—A, 450; after citing and discussing numerous cases in this and other courts it was said:

"In none of the decisions cited and relied

> on by counsel for plaintiff-in-error was anything said that in any way limited or modified the doctrine laid down in the decisions heretofore considered, that Congress by the Federal Employers' Liability Act intended to occupy the field of employes' liability to employees for all injuries occurring on railroads while engaged in interstate commerce. Under those decisions the conclusion is inevitable that in a suit to recover for an injury on a railroad occurring while the employer and employee were engaged in interstate commerce the Federal Employers' Liability Act alone would control and could not be pieced out or supplemented by a State statute. The decedent having been engaged, at the time of his death, in interstate commerce, the recovery must be had, if at all, under and subject to the provisions of the Federal Employers' Liability Act."

This last mentioned case is precisely in point, as the statute of Illinois has a provision similar to that of New Jersey with respect to the presumption that the compensation provisions of the statute shall apply unless notice be given to the contrary; the Illinois statute also has another provision similar to that of the New Jersey act, enacting that those who do not pay compensation are deprived of certain of the common law defenses such as assumption of risk, negligence of a fellow-servant and contributory negligence. See laws of Illinois, 1913, p. 335.

The *Staley* case was cited with approval by the Supreme Court of Illinois in *Chicago etc., Ry. Co. v. Industrial Board*, 113 N. E. 80 wherein the court said:

> "If, as plaintiff-in-error contends, Stockton (the employee) was engaged in interstate commerce at the time of his injury, then the federal act applies and there is no liability

under the Illinois Workmen's Compensation Act."

The Court, however, affirmed an award of the Industrial Board in favor of the employee's representative, on the ground that at the time of the accident the employee was not engaged in interstate commerce within the meaning of the Federal Act—it appearing that he was a watchman in a railroad yard and that when the accident happened he was not then inspecting or guarding cars loaded with interstate freight. This conclusion was based on the decision of this court in *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051.

In this connection attention should also be called to certain other cases in which the question under consideration is discussed or suggested. Thus in *Hammill v. Penn. R. R. Co.*, 88 N. J. L. 717, 94 Atl 313, the same branch of the New Jersey Supreme Court which decided the *Rounsaville* case, *supra*, said that the Federal act was intended to apply to a case where no claim of negligence on the part of the employer could reasonably be made. However, this case did not turn upon that point as the workman was not employed by the railroad in its capacity as "a common carrier by railroad," but was employed on the Delaware & Raritan Canal as a boatman. It was held that the Federal Statute did not apply because the defendant as the employer "was operating a canal and not a railroad."

In *Jensen v. Southern P. Co.* 109 N. E. 600, 215 N. Y. 514, (now pending in this Court) it was held that the Federal statute applied only to railroads and therefore did not exclude recovery under the state compensation law, because so far as the case under consideration was concerned the railroad was a carrier by water, and it did not appear that its

transportation by means of steamship was in any way related to transportation by railroad. The workman in that case was killed while unloading a steamship which was berthed alongside of a pier in the Hudson River.

In *Kennerson v. Thames Tow Boat Co.*, 89 Conn. 367, 94 Atl. 372, it was held that the workmen's compensation act of the State of Connecticut applied to an employee who was killed in the course of his employment while working on a boat which was navigating the waters of another state. The opinion states that there is nothing in the record to indicate that the accident happened while the employee was engaged in interstate or foreign commerce and then continues:

> "Congress has not as yet legislated in regard to injuries occurring in interstate commerce by water; the state therefore may."

In *Walker v. Clyde Steamship Co.*, 109 N. E. 604, 215 N. Y. 529, (now pending in this Court) claimant was injured on a steamship lying alongside of a pier in the Hudson River. It was claimed that the New York Workmen's Compensation Act did not apply because the case was exclusively one of admiralty jurisdiction. The court decided otherwise, on the ground that prior to the passage of the New York statute an injured employee had his option to sue either at common law or in admiralty and that the remedy provided by the state court was merely a substitute for the common law remedy and that therefore the injured employee still had his option to proceed either under that statute or in admiralty.

The conclusion reached in the last cited case is at variance with that reached by the Supreme Court of the State of Washington in the case of

Jarvis v. Daggett, 151 Pac. 648, where it was held that the Workmen's Compensation law of that state did not apply to cases of admiralty jurisdiction; and that therefore an employee injured under such circumstances as to confer jurisdiction upon the court of admiralty must pursue his remedy in that court alone, and could not bring proceedings under the State Compensation Act.

In *Stoll v. Pacific Coast S. S. Co.,* 205 Fed. 169, it was held by one of the Federal district courts in the State of Washington that the Workmen's Compensation Act of that state was applicable to an injury received in interstate commerce *by water.* This conclusion was reached on the ground that, as Congress had not legislated in regard to such interstate commerce, the state had the right to enact laws incidentally affecting same.

In the case of *The Fred E. Sanders,* 208 Fed. 724, it was held by another Federal district court in the State of Washington that the Compensation Act of that state did not prevent a workman from proceeding in admiralty to enforce a lien given by the maritime law; this conclusion being reached on the ground that the state had no power to abolish or limit the jurisdiction of courts of admiralty over maritime torts conferred by the Federal Constitution. In the same case the same court subsequently decided (the libel having been amended in the meantime so that it appeared that the libellant had received from the State Industrial Commission certain payments under the Compensation Act of the State) that the election by the employee of the remedy given him by the state law prevented him from proceeding in admiralty and thereby obtaining double compensation.

In *Schuede v. Zenith S. S. Co.*, 216 Fed. 566 (now pending in this court) it was held that in case of an injury to a seaman the maritime law determines his rights to the exclusion of the law of the state where the injury occurred and the suit is brought, and that therefore the Ohio Employers' Liability Act did not apply to such a case.

In *Connole v. Norfolk & W. Ry. Co.*, 216 Fed. 823, it was held that the Ohio statute did not apply to carriers and other employees engaged exclusively in interstate commerce but did apply to those engaged in both interstate and intrastate commerce where their mutual connection with intrastate work was separable from interstate and foreign commerce when, and only when, they elected to be governed by the statute; and that where there was no averment in the plaintiff's petition to show such election the petition would be struck out.

In *Berton v. Tietjen & Lang Dry Dock Co.*, 219 Fed 763, (U. S. District Court for District of N. J.) the petition of the defendant for limitation of liability under the admiralty law was denied, and the petition of the plaintiff to remand to the Hudson County Court of Common Pleas in the State of New Jersey was granted—it appearing that his petition was filed under the New Jersey Compensation Act and that the accident happened without negligence while the plaintiff was working upon a vessel in defendant's dry dock The court decided that the contract of hiring was not maritime, because a dry dock was not a "vessel" within the meaning of the Federal statutes providing for a limitation of liability in favor of the owners of vessels or ships, and that therefore the state courts had "concurrent" juris-

diction and the action was not removable as one arising under the admiralty law.

In *Peck v. Boston & M. R. Co.*, 223 Fed. 448, the complaint alleged two causes of action, the first under the Workmen's Compensation Act of Massachusetts (the accident having occurred in that state) the second under the Federal Employers' Liability statute. After removal from the Supreme Court of New York to the United States District Court for the Northern District of that state, the latter court granted a motion to remand on the ground that the Federal Act controlled, it appearing that both parties were engaged in interstate commerce and that under Sec. 28 of the Federal Code of 1911 no action brought under the Federal statute was removable.

In *Hogan v. New York Central*, 223 Fed., 890 (Circuit Court of Appeals, Second Circuit) held that an action under the Federal Act was not barred by reason of the fact that the plaintiff had previously brought an action in the state court under a State Employers' Liability Act—which action was discontinued before suit was brought under the Federal Act. In answer to the claim of defendant that the plaintiff had "elected" to proceed under the New York law, the court said:

> "* * * it may be well to state that we fail to see how the commencement and subsequent discontinuance of the action in the state court and under the state law could estop the complainant from bringing her action in a federal court. In *Snow v. Alley*, 156 Mass. 193, 195, 30 N. E. 691, 692 (1892) Mr. Justice Holmes, now of the Supreme Court of the United States correctly stated the doctrine of election when he said:
>
> "'Election exists when a party has two alternative and inconsistent rights, and it

> is determined by a manifestation of choice. *Metcalk v. Williams,* 144 Mass. 452, 454 (11 N. E. 700). But the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule. *Butler v. Hildreth,* 5 Metc. 49, 52; *Snow v. Alley,* 144 Mass. 546, 554, 560 (11 N. E. 764, 59 Am. Rep. 119); *Whiteside v. Brawley,* 152 Mass. 133, 135 (24 N. E. 1088); *Morris v. Rexford,* 18 N. Y. 552, 557.'"

In *Grand Trunk Ry. Co. v. Knapp,* 233 Fed., 950 (Circuit Court of Appeals, Sixth Circuit, June 1916), judgment for plaintiff was affirmed in a suit brought under the Federal statute, it appearing that he was employed in interstate commerce at the time of the accident and that there was no negligence on the uart of the carrier. The court discusses the claim that the action was barred by defendant's election to come under the provisions of the Workmen's Compensation Act of the State of Michigan, and cites various cases including those cited herein *supra,* on the question as to whether the State Act was applicable to non-negligent injuries to employees in interstate commerce. But no opinion was expressed on the point, as the court decided that the Federal statute was clearly exclusive in the particular case because the accident was the result of negligence.

The same result was reached by the same court in the case of *Waters v. Guile, Receiver of Pere Marquette R. R.,* 234 Fed. 532 (July 1916) and a judgment affirmed for plaintiff on the ground that the Federal statute provided the exclusive remedy "for at least negligent injuries to em-

ployees of interstate railroad carriers while actually engaged in interstate commerce."

In *Young v. Duncan,* 218 Mass. 346, 106 N. E. 1, the court said, by way of dictum, in referring to the Workmen's Compensation Act of the State of Massachusetts (italics ours):

> "The purpose of this act has been stated several times. Briefly, it was to substitute a method of accident insurance in place of the common-law rights and liabilities for substantially all employees except domestic servants, farm laborers and masters of and seamen on vessels engaged in interstate or foreign commerce, and those whose employment is casual or not in the usual course of trade, business or employment of the employer, *and probably those subject to the Federal Employers' Liability Act.*"

In a note in Vol. 9, Neg. and Comp. Cases, Ann., p. 307, the several reported cases on this subject are reviewed and the following "conclusion" reached:

> "In *Rounsaville v. Central R. Co.,* and *Winfield v. New York Cent. & H. River R. Co., ante,* the courts held that the Federal Employers' Liability Act was applicable solely to injuries sustained by employees while engaged in interstate commerce caused by negligence and that if an injury occurred not due to negligence, the employee, although engaged in interstate commerce, could recover under State Workmen's Compensation Acts. In determining the field covered by the Federal Employer's Liability Act, the question must be solved in the light of the decisions of the United States Supreme Court and it is quite evident that the courts in both of these cases did not consider the question in the light of these decisions as none of them is cited or referred to.
>
> "In *Smith v. Industrial Accident Commis-*

sion of California, ante, and *Staley v. Illinois Cent. R. Co., ante,* the right of an interstate employee to recover under State Workmen's Compensation Laws was considered in the light of the decisions of the United States Supreme Court construing the effect of federal laws upon state laws.

"It would seem, when the question is considered from the standpoint of the principles enunciated in the decisions of the national courts, that an employee of a common carrier by railroad engaged in interstate commerce cannot take his choice of remedy but must recover, if at all, under the federal act; for as well stated by Judge Rogers in a pioneer opinion (*Fulgham v. Midland Val. R. Co.,* 167 Fed. 660, 1909):

> "'It is clear that the Act of April 22, 1908, *supra,* superseded and took the place of all state statutes regulating relations of employers and employees engaged in interstate commerce by railroads. It covers and overlaps the whole state legislation, and is therefore exclusive.'

"Both statutes cannot apply in the same field and therefore both cannot cover the same injury and the question of the applicability of the two laws certainly should not turn up the further question of the existence or absence of negligence, for if an employee is injured through the violation of the Federal Safety Appliance Act no negligence need be shown. Obviously congress by this statute intended to cover the entire field of the liability of interstate railroads to employees engaged in interstate commerce."

In an exhaustive note the editor of L. R. A. discusses the cases and concludes as follows:

> "There has been no authoritative ruling by the United States Supreme Court upon this question. It would seem, however, that the decision in *Staley v. Illinois C. R. Co.* is more reasonable than the position taken by the New

York court in the Winfield case, supra. The United States Supreme Court had said in a comparatively large number of decisions that, Congress having acted upon the relationship of employers and employees in the case of interstate carriers by rail, all state legislation is superseded. It is true that the Federal act furnishes a remedy only where the carrier has been negligent, and that the Supreme Court has decided that the Federal act superseded the state acts only in cases where the state acts attempted to impose a liability for negligence.

"One of the main grounds for upholding the constitutionality of the compulsory statutes is that they cover the entire field of the liability of employers for injuries to employees, and that, while they impose additional burdens on some employers, they relieve those employers and all others form the danger of suit for damages. However, under the decisions of the New York, New Jersey, and Connecticut courts, an interstate carrier by rail, although he may have paid his contribution into the insurance fund, or become insured in some other way, is not freed from other liability, but is subject to a suit for damages in case the injury has happened because of his negligence. From the same point of view the employer is not freed from other obligations where the injury was of such a character that his property may be proceeded against in admiralty. Thus, if the above named courts are correct in saying that the compensation laws apply notwithstanding the employee is within the provisions of the Federal employers' liability act, or if the case is one in which admiralty has jurisdiction, it would seem that one of the strongest grounds for upholding the constitutionality of the statutes is removed."

L. R. A. 1916—A, p. 464.

In the Second Edition of Richey's Federal Employers' Liability, p. 48, Sec. 28, (recently pub-

lished) the author after reviewing the cases says (italics ours):

> "There can be no recovery under a State Workmen's Compensation Act, when the case is comprehended within the meaning and scope of the Federal Employers' Liability Act but recovery can only be had under this last-named law. The cases to the contrary are based on two theories; (1) that the right of recovery under the state law is contractual and not covered by the federal act granting a right of recovery for tort, and (2) that as such state laws give a right of recovery for injuries in any case while the federal act permits a recovery only where there is negligence, they do not cover the same subject matter and therefore are not excluded.
>
> "If it is held that a State Compensation Act may apply, the question of double recovery is easiest answered, for it may well be held that when an employee has received pay for the inpury which he has sustained upon a remedy chosen by him, and that his election of one of such remedies prevents him from resorting to the other.
>
> "*But the uniformity of the decisions to the effect that when the employer and employee are engaged in interstate commerce that the rights of each are to be determined by the federal act, whether it be more favorable or less favorable than the state law, makes any other conclusion, than that the law is supreme in these cases also, impossible.*
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> "In *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 66, 57 L. Ed. 417, 33 S. Ct. 192, Ann. Cas. 1914c, 176, the court said:
>
> > "'By this act congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states.'
>
> "Though it may be that many of the inju-

> ries on railroads while engaged in interstate commerce occur without any negligence on the part of any one, and that therefore the conclusion here reached will leave many injured employees—or if the injury causes death, their relatives—without any opportunity for compensation, and is contrary to the spirit of the times, which demands humane legislation covering this subject, this is an argument that may well be addressed to the federal congress, but the courts must confine themselves to the proper construction and operation of this act and cannot consider the evils which it is claimed will arise from its execution, however real those evils may be."

The author then quotes from the *Staley* case, supra, and continues as follows:

> "It has been said that the act in providing liability 'in certain cases' indicates that it does not cover all grounds of liability, and for this reason a liability created by a state for an injury sustained without negligence was not covered by the act. But it is more reasonable to suppose that the phrase was inserted in this title to obviate some of the defects suggested in the title of the act held unconstitutional, and that the 'certain cases' was meant to limit it to those cases where the liability arose in interstate commerce.
>
> "Nor should it seem that it would be necessary in order for the defendant to preclude a recovery under a Compensation Act, to show that it had been negligent and therefore liability existed under the federal act, as has been intimated in two decisions. But all that is necessary is to show that the railroad and the employee were engaged in interstate commerce, the same as when it is desired to have the case tried under the federal law to the exclusion of any other state law, and its ultimate liability under the federal law would be determined on the trial."

F. It was the intention of Congress to cover the entire field of Employers' Liability in all cases where a carrier by railroad was engaging and its employees were employed, in interstate commerce. In such cases the Federal statute covers the same field as the New Jersey statute and is therefore exclusive of the latter.

Assuming that in the present case the facts as found by the New Jersey Supreme Court show that the defendant at the time of the accident was a common carrier by railroad engaging in interstate commerce and that the employee was injured while employed by such carrier in such commerce, so as to come within the terms of the Federal Employers' Liability Act, the precise question now presented is this; in a case where there is no proof of negligence, can the dependent of a deceased employee recover compensation according to the provisions of the State law providing for compensation in all cases regardless of negligence, when the carrier and the employee were operating under the contract implied by the New Jersey statute?

In order to determine the answer to this question, it will first be necessary to examine the scope and purpose of the New Jersey Compensation Act. (NOTE: For the convenience of the Court complete copies of this statute in pamphlet form are submitted with this brief.)

SUMMARY OF NEW JERSEY COMPENSATION ACT.

By chapter 95, Laws of 1911, the Legislature of the State of New Jersey enacted a statute entitled

> "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure

for the determination of liability and compensation thereunder."

By section I of said statute it is provided that when personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the negligence of the employer is the proximate cause, the employee shall receive compensation therefor, provided he himself is not willfully negligent; it further provides that the right to compensation under section I shall not be defeated on the ground of negligence of a fellow employee or on the ground of assumption of risk—both of which grounds of defense are expressly abolished.

The following is a copy of those paragraphs of section I which deal with the above subjects:

"SECTION I. COMPENSATION BY ACTION AT LAW.

"1. When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employee was himself not willfully negligent at the time of receiving such injury, and the question of whether the employee was willfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.

"2. The right to compensation as provided by section I of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employee; or that the injured employee assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances; which said grounds of defense are hereby abolished."

Paragraph 3 of section I provides that the existence of an independent contract or sub-contract shall not bar the liability of the employer in certain cases.

Paragraph 4 reads into the statute the provisions of the New Jersey Act providing for the recovery of damages in cases of death by wrongful act, neglect or default.

Paragraph 5 places upon the defendant the burden of proof to establish wilful negligence.

Paragraph 6 requires that claims for legal services be approved by the trial judge.

By section II of said statute it is enacted that when the employees and the employee shall by agreement, either express or implied, accept the provisions of said section II, compensation for injuries or death by accident arising out of and in the course of employment shall be made by the employer without regard to negligence of the employee, according to a certain schedule contained in said statute in all cases except when the injury or death is intentionally self-inflicted or when intoxication is the proximate cause of injury, and that said agreement shall be a surrender by the parties of their rights to any other method, form or amount of compensation or determination thereof than as provided in said section II and an acceptance of all the provisions of said section, and shall bind the employees and his personal representatives, widow and next of kin. It is further provided that every contract of hiring made subsequent to the time provided for the act to take effect shall be presumed to have been made with reference to the provisions of said section II, and unless there be as a part of such contract an express statement in writing prior to any accident, either in the contract itself or by written notice from either

party to the other, that the provisions of section II were not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II and agreed to be bound thereby.

In case of failure to agree upon a claim for compensation either party may submit the claim to the judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case.

The following is a copy of the provisions in question:

SECTION II. ELECTIVE COMPENSATION.

"7. When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.

"8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of section II of this act, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

"9. Every contract of hiring made subse-

quent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby. In the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

* * * * *

"18. In case of a dispute over, or failure to agree upon a claim for compensation between employer and employee, or the dependents of the employee, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding."

Shortly after this statute went into effect it was attacked as unconstitutional on a variety of grounds, but none of them involved the question presented by the present case. The statute was sustained.

See

Sexton v. Newark District Telegraph Co., 84 N. J. L. 85; 86 Atl. 451; affirmed 86 N. J. L. 701; 91 Atl. 1070;

Troth v. Millville Bottle Works, 86 N. J. L. 558; 91 Atl. 1031;
Brost v. Whitall Tatum Co., 99 Atl. 315.

Subsequently, the question of the right of an employee or his dependents to recover compensation in cases of accident arising without negligence while the carrier was engaging in interstate commerce and the employee was injured while employed in such commerce, came up and various conclusions were reached. The cases on this subject have been cited under subhead (E).

We now urge that the decision of the Court of Errors and Appeals of New Jersey reversing the decision of the Supreme Court of that State in the present case is erroneous for the reason that it was the intention of Congress in passing the Employers' Liability Act to cover the entire field and to deal with the whole subject matter of the liability of common carriers by railroad to their employees in all of those cases to which the statute, by its terms, was applicable; and as a necessary incident, to exclude any action by the state in such cases. That such was the intention of Congress we submit may be deduced from a consideration of (1) the statements of this Court in construing the Federal statute, (2) the necessary implications found in the statute itself, (3) the message of the President and the reports of legislative committees on the subject of such legislation and (4) conflict between the Federal statute and the New Jersey compensation statute.

1. DICTA OF THIS COURT. In *Second Employers' Liability Cases,* 223 U. S. 1, 56 L. Ed. 327, in discussing the constitutionality of those provisions of the Federal statute which removed or impaired certain defenses that were available at common

law, such as negligence of a fellow-servant, contributory negligence and assumption of risk, it was said (italics ours):

> "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end, tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution (citing cases). We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, *operating uniformly* in all the states upon *all* carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce (citing cases). * * *
>
> "Coming to the question of classification, it is true that the liability which the Act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit *of all employees of such carriers by railroad who are employed in interstate commerce*, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employees in such commerce, not within the Act, are exposed" (pp. 51, 52).

In *Philadelphia, etc., R.R. Co. v. Schubert*, 224 U. S. 603; 56 L. Ed. 911, it was held that the right of an employee to recover under the Federal law was not barred by the acceptance of benefits under the terms of the carriers' "Relief Fund." In the course of the opinion it was said:

> "When it (Congress) decided to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective."

In *Michigan Central R. R. v. Vreeland*, 227 U. S. 59; 57 L. Ed. 417, at p. 66, the court said:

> "We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury."

In *Seaboard Air Line v. Horton*, 233 U. S. 492; 58 L. Ed. 1062, at p. 501, this court, referring to section 1 of the statute, said (italics ours):

> "This clause has two branches: the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. *But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence.*"

In *McGovern v. Phila. & Reading R. Co.*, 235 U. S. 389; 59 L. Ed. 283, it was held that the benefits of the Federal statute extended to non-resident aliens and gave them the right to maintain actions under that statute for damages causd by death of relatives. In reaching this conclusion the court cited several cases on the subject of the right of non-resident aliens to recover damages in actions brought under statutes giving the right to recover damages for wrongful death, and then said:

"We may refer to these cases for their reasoning without reproducing it, and need not do much more than add that the policy of the Employers' Liability Act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of railroad companies" (p. 399).

2. THE IMPLICATIONS IN THE FEDERAL STATUTE.

In order to give a reasonable construction to the statute it is necessary to read certain implications therein; thus in section 3 the subject of contributory negligence on the part of the employee is considered; and it is enacted that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; there is nothing in this section which expressly provides that in a case of contributory negligence the employee shall be entitled to recover damages; all it provides is that contributory negligence shall not "bar" a recovery, but no one would suggest that the failure to expressly provide for a partial recovery in a case of contributory negligence bars the employee from any recovery at all under such circumstances.

Thus, also, in section 4 we find the provision that the employee shall not be held to have assumed the risk in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death. The implication from this section is not, perhaps, quite so clear as that in section 3 but whatever doubt there may have been on the subject has been settled by this court in *Seaboard Air Line v. Horton*, 233 U. S. 492; 58 L. Ed. 1062, and *Southern Ry. Co. v. Crockett*, 234 U. S. 725; 58 L.

Ed. 1564, holding that this section by eliminating the defenses of assumption of risk in the case specified therein "quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." See 233 U. S. at p. 503.

Again in dealing with Section 5 this Court held that the provisions thereof making void any contract, etc., the purpose and intent of which "shall be" to enable any carrier to exempt itself from any liability created by the act was applicable to existing, as well as to future contracts. See *Phila. etc. R. Co. v. Schubert*, 224 U. S. 603; 56 L. Ed., 911; *Chicago & Alton R.R. Co. v. Wagner*, 239 U. S. 452; 60 L. Ed. 379.

The foregoing are illustrative of what the Courts have held to be necessarily implied in the staute. The same principle, we submit, as has been held applicable to various other sections of the statute should also be held applicable to section 1.

As was said in the case of *Savage v. Jones*, 225 U. S. 501; 56 L. Ed. 1182 at page 533:

> "The entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed."

Turning back to section 1 of the statute, we find that it provides that in certain cases therein stated every common carrier by railroad "shall be liable in damages" to certain employees injured or killed, "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, work boats, wharves or other equipment."

Section 2 has similar provisions applicable to cases arising in the Territories, the District of Columbia, the Panama Zone or other possessions of the United States.

Sections 1 and 2 have a two-fold purpose; first, to take away the defense of negligence of a fellow-servant; second, to make the carrier liable in all cases of accident due to its own negligence, the words used being broad enough to cover every possible accident that might result from the negligence of the carrier itself as distinguished from the negligence of fellow-servants. See *Seaboard Air Line v. Horton*, 233 U. S. 492, at page 501; 58 L. Ed. 1062; *DeAtley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591, at p. 595. The first of these two provisions operated to change the common law by removing the defense of negligence of a fellow-servant, but the second is merely declaratory of the common law.

We therefore urge that the necessary implication from the general scheme of the statute and the language thereof is that it was the intention of Congress to compel the carrier to respond in damages only in cases of negligence which come within the terms of the statute; and not to require the carrier to respond in damages in those cases which come within the terms of the statute, but which result without negligence on the part of the carrier or any of its officers, agents or employees.

> "The Congress having legislated upon this phase of interstate commerce, such legislation is exclusive, and its non-action, in cases of accident without negligence, is a declaration that it shall remain free from said legislation."

(Opinion of Warren Common Pleas in case of

Rounsaville v. Central R. R., 37 N. J. Law Journal; 295, at p. 298.)

In the case of *Winfield v. New York Central R. R.*, 216 N. Y. 284, 110 N. E. 614, it is said that the view Congress intended to observe as to the distinction between a liability statute and a compensation statute is "fortified" by the fact that it has passed a compensation law exclusively applicable to Federal employees, in which liability is imposed without regard to negligence (35 U. S. Stat. 556; U. S. Comp. Stat. 1913, §§8923-9). If this fact has any bearing at all on the point under consideration, we submit that so far from indicating that Congress intended in the Federal Employers' Liability statute to limit the application of that statute to cases where compensation could be obtained only in cases of negligence and thereby to leave to the states the power to pass statutes requiring compensation in accidents arising without negligence, it rather shows the contrary, because if Congress had intended thus to limit the Employers' Liability statute it might readily have said so. Moreover, Congress might well have one theory of liability for accidents arising in employments under the commerce clause and an entirely different theory of liability for accidents arising under laws which are not dependent upon its power to regulate interstate commerce.

As bearing upon the claim that the necessary implication of the Federal statute is that there shall be liability where there is negligence and no liability where there is no negligence, we quote as follows from an editorial in Central Law Journal, Vol. 82, page 44 (issue of January 21, 1916):

> "It seems to us, therefore, that if we get beyond the federal question involved, we are then confronted with the purpose of the

> state act, as shown by its procedure to ascertain the measure of liability. But to us it seems clear, that, if the federal act forbids any recovery from an employer except as arising out of negligence, this should be construed to mean that no penalty where there is no negligence should be imposed. The federal act is not alone for the protection of employees, but also it may be deemed for the protection of employers. The whole question, therefore, resolves itself into the inquiry, whether or not there is a strong negative pregnant in the federal act against any penalty being visited on a federal instrumentality where it is not at fault. As federal law has no office merely to right a civil wrong, but to protect federal means, this question ought to be answered in the affirmative."

In Central Law Journal, Vol. 82, p. 63 (issue of January 21, 1916), in commenting upon the cases of *Nelson v. Illinois R. Co.*, 155 N. W., 169, and *Tonselito v. New York Central R. Co.*, 87 N. J. L., 651, 94 Atl., 804 (relative to right of a father to recover at common law for the value of the services of a minor child), it is said:

> "We think there is room for distinction between this case and the question whether the Workmen's Compensation Act was or not applicable to an interstate carrier in any respect. But we see no difference between a parent suing for the death of his minor child and merely suing for injury, loss of services being the gravamen of action in both instances. But there still arises the question of intent in the federal act, the carrier being controlled as to all operations and whether its purpose was to impose, primarily, a penalty, or to vest those suing it with a cause of action for redress of a wrong. As we said in our editorial, it is not the office of the federal government to create merely actionable negligence so far as private parties are concerned."

In a subsequent issue of the same journal (Vol. 82, p. 171—issue of March 10, 1916), the instant case was discussed and after quoting from the opinion of the Court of Errors and Appeals the editor said:

> "It seems a mere juggling of words to say there is not a liability but only a contractual obligation. If the contractual obligation takes in, injury from tort by employer, it certainly is excluded by the federal act. And if it intended to cover the whole field of accident for which an employer in interstate commerce is liable, injury not thus arising would also be excluded.
>
> "As we urged in 82 Cent. L. J., 43, the real question is whether the federal act intended that no other burden should be put upon a carrier in interstate commerce, and, therefore, on commerce itself, than was imposed for injury occurring as in that act stated. It could have said the carrier should not be liable at all, but employees should take all risks. Did it not impliedly say they did this when the carrier was not negligent at all? The act gives a remedy to a class. Can the class have a remedy in other law?"

The same argument expressed in somewhat different language is found in the dissenting opinion of the Appellate Division, New York Supreme Court, in the case of *Winfield v. New York Central R. R.*, from which we quote (153 N. Y. Supp., 503):

> "By Section 114 of the Compensation Act it is provided that the provisions of this chapter shall apply to a workman engaged both in intrastate and interstate commerce 'for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly

separable and distinguishable from interstate or foreign commerce.' Congress has assumed to legislate upon the liability of masters to their servants where the masters are engaged in interstate commerce. Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291. These acts provide for a liability in excess of common law liability. Upon the principle of 'expressio unius exclusio alterius,' the acts constitute a denial of liability, except in the cases mentioned. In any event a rule of liability is established by Congress directly within the terms of Section 114, and the work in which the claimant was engaged was not severable from interstate commerce. Section 114 seems to contemplate cases where Congress had legislated either as to a rule of liability or as to a method of compensation. It seems to have been within the mind of the Legislature that Congress might hereafter pass a Workmen's Compensation Act. Having limited, however, the effect of this Compensation Act to cases in which either a method of compensation or a rule of liability had been established, the intent would seem clear to exclude all cases where the party was engaged in work not severable from interstate commerce, as long as the rule of liability of master to servant, where the work was performed in connection with interstate commerce, had already been prescribed by Congress."

3. MESSAGE OF THE PRESIDENT AND REPORTS OF COMMITTEES.

The messages of the President may be referred to for the purpose of determining the scope of legislation.

Kepner v. U. S., 195 U. S., 100; 49 L. Ed., 114.

One of the principal motives for the passage of the Federal statute was the desire for uniformity

throughout the States. This is indicated by the President's message of January 31, 1908, which was sent to Congress a few days after the first Employers' Liability Act was declared unconstitutional. We quote:

> "Interstate employment being thus covered by an adequate national law, the field of intrastate employment will be left to the action of the several States" (Vol. 8, U. S. Doc. 5241, p. 1).

That Congress intended to cover the entire field of the liability of common carriers by railroad to employees in interstate operations is further shown by the reports of certain legislative committees. These reports may be examined in order to determine the purpose of Congress in enacting a statute and the scope and effect thereof.

> *Holy Trinity Church v. U. S.*, 143 U. S., 457, 464; 36 L. Ed., 226;
> *Chesapeake etc. Tel. Co. v. Manning*, 186 U. S., 238, 246; 46 L. Ed., 1127;
> *Binns v. U. S.*, 194 U. S., 486; 48 L. Ed., 1087;
> *St. Louis etc. Ry Co. v. Craft*, 237 U. S., 648, 661; 59 L. Ed., 1160.

We quote from the report of the Committee on Judiciary, House Rep., 1386, 60th Cong., 1st Sess., in Vol. 2, U. S. Doc., 5226:

> "It (the present bill) is intended in its scope to cover all commerce to which the regulative power of Congress extends" (page 1).

Again:

> "By this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees" (page 1).

Again:

> "It will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employers' liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States" (page 3).

Again, from the report of Committee on Education and Labor, Sen. Rep., 460, 60th Cong., 1st Sess., in Vol. 2, U. S. Doc. 5219, at page 2:

> "Yet somebody must assume these risks, and the tendency throughout the world in those countries where the industrial life of the community is thoroughly organized has been to modify the doctrine of negligence so as to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged; that is, upon the whole community. The proposed measure is intended to effect this reasonable reformation in our industrial code."

The question of whether it would be expedient to make interstate carriers liable, regardless of negligence, was considered and rejected by both committees. We quote from the report of the Committee on Education and Labor, *supra,* at page 3:

> "The provisions of this bill do not go to the extreme length of making the employer liable without reference to the negligence of the workman, although many wise and good men think that that ought to be done. * * * Undoubtedly the time is coming when a liberal scheme of compensation to injured employees will become general in the United States either under wise provisions of law or through the voluntary actions of our great corporations."

See also Report of Committee on Judiciary, *supra,* at pp. 96 and 98).

4. CONFLICT BETWEEN THE FEDERAL STATUTE AND THE NEW JERSEY COMPENSATION STATUTE.

The question of whether an act of Congress supersedes a statute of the State depends largely upon whether the two laws are in conflict; if they are, then the State law must yield.

Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426; 51 L. Ed., 553;
No. Pac. R. Co. v. Washington, 222 U. S., 370, 379; 56 L. Ed., 237;
So. Ry. Co. v. Reid, 222 U. S., 424, 442; 56 L. Ed., 257;
Savage v. Jones, 225 U. S., 501, 533; 56 L. Ed., 1182;
St. Louis etc. Ry. Co. v. Edwards, 227 U. S., 265; 57 L. Ed., 506;
Hampton v. St. Louis etc. R. Co., 227 U. S., 456; 57 L. Ed., 596;
Adams Express Co. v. City of New York, 232 U. S., 14; 58 L. Ed., 483;
Erie R. R. Co. v. New York, 233 U. S., 671; 58 L. Ed., 1149; 52 L. R. A. (N. S.), 266;
Southern Ry. Co. v. Railroad Commissioners, 236 U. S., 439; 59 L. Ed., 661;
Charleston & W. C. Ry. Co. v. Varnville Furniture Co., 237 U. S., 597; 59 L. Ed., 1137;
Atchison etc. Ry. v. Harold, 241 U. S., 371; 60 L. Ed., 1050;
Atlantic Coast Line R. Co. v. Georgia, 234 U. S., 280; 58 L. Ed., 1312;
McDermott v. Wisconsin, 228 U. S., 115; 57 L. Ed., 754;

Sligh v. Kirkwood, 237 U. S., 52; 59 L. Ed., 835.

These principles have frequently been applied in cases where there was a substantial conflict between the State and the Federal law relating to the liability of the master for injuries to the employee. For illustrations see cases cited under Point II-C.

If the law of the particular State where the accident happens is substantially similar to the provisions of the Federal statute, then the carrier's liability is not affected by the question as to which law governs the case.

Wabash R. Co. v. Hayes, 234 U. S., 86; 58 L. Ed., 1226;
Chicago & N. W. R. Co. v. Gray, 237 U. S., 399; 59 L. Ed., 1018;
Kansas City W. Ry. Co. v. McAdow, 240 U. S., 51; 60 L. Ed., 520.

The necessary implication from these last cited decisions is that if the statute of the State is substantially different from the Federal statute, then the question of which law governs does become material; and of course in the event of such conflict the State law must yield.

Under the provisions of the New Jersey Compensation Act it is not possible to combine in one cause of action a claim under the State act and a suit under the Federal act; in the former the facts are determined by the judge and the amount of recovery is limited to certain specified sums according to the earnings, nature and extent of the injury, the degree of relationship and the dependency, etc., whereas in the latter the amount of recovery is determined by the jury under appropriate instructions; and the jury, and not the

court, are the judges of the facts. Hence, the procedure followed in the case of *Wabash R. Co. v. Hayes*, 234 U. S., 86, 58 L. Ed., 1226, wherein the plaintiff pleaded both under the Federal act and under the State law, cannot be adopted.

That there is a substantial conflict between the Federal Employers' Liability act and the New Jersey Compensation act is apparent from a comparison of the two laws.

Thus we find that Section 1 of the Federal act provides for liability in case of accident resulting in whole or in part from the negligence of any of the officers, agents or employees of the carrier or by reason of any defect or insufficiency due to its negligence in its cars, &c. Paragraph 1 of the New Jersey act provides for "compensation" to an employee for injury caused by an accident of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause; paragraph 2 provides that this right to compensation shall not be defeated on the ground of negligence of a fellow employee.

It will be seen that the two statutes cover precisely the same field with respect to (a) liability of the employer in the case of negligence on its part and (b) removal of the defense of negligence of a fellow servant.

Section 3 of the Federal act removes the defense of contributory negligence to a limited extent and provides a method for estimating the comparative negligence of the employee and the employer; paragraph 1 of the New Jersey act after reciting that the employee shall be entitled to compensation in the event of negligence on the part of the employer then enacts, "provided the employee was himself not wilfully negligent at the time of receiving such injury."

The section of the Federal act which deals with the subject of contributory negligence does not provide any test of the fact of such negligence but paragraph 23 of the New Jersey Statute (which has been construed to be applicable to paragraph 1——see *Taylor v. Seabrook,* 87 N. J. L., 407, 94 Atl., 399) provides that "willful negligence" shall consist of (1) deliberate act or deliberate failure to act or (2) such conduct as evidences reckless indifference to safety or (3) intoxication operating as the proximate cause of injury.

The New Jersey act makes no provision for the reduction of damages in the case of contributory negligence on the part of the employee. The conflict between the Federal law and the State law on this subject is obvious.

Section 4 of the Federal act, as construed in the Horton and other cases, *supra,* removes the defense of assumption of risk in cases where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death, but permits such defense to be made in all other cases.

Paragraph 2 of the New Jersey act enacts that the right to compensation as provided in Section 1 shall not be defeated upon the ground that the injured employee assumed the risks "inherent in or incidental to or arising out of his employment," etc., and expressly abolishes the defense of assumption of risk.

Here again the conflict between the Federal and the State law is obvious.

Section 1 of the Federal act, in case of the death of an employee, allows damages to his personal representative for the benefit of the surviving widow or husband and children of such

employee; and, if none, then to the parents and if none then to the next of kin dependent upon him. Paragraph 4 of the New Jersey act provides that paragraphs 1, 2 and 3 shall apply to any claim for the death of an employee arising under the act entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default", approved March 3, 1848, and the amendments and supplements thereto. The New Jersey statute of 1848 (Vol. 2, New Jersey Compiled Statutes of 1910, page 1907), as amended by Chapter 287 of the laws of 1913, page 586, provides that

> "The amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, and next of kin of such deceased person, and shall be distributed to such widow, surviving husband, and next of kin, their (in the) proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death to the wife, surviving husband, and next of kin of such deceased person; provided, that where such deceased person has left or shall leave him or her surviving a widow or husband but no children or descendant of any children and no parents, the widow or surviving husband, as the case may be, shall be entitled to the whole of the damages which she or he shall sustain and which shall be hereinafter recovered in any such action, and the same shall be paid to her or him."

The present New Jersey statute providing for the distribution of the property of intestates is chapter 47 of the laws of 1914, page 69. For the purpose of the present discussion it is unneces-

sary to state the details of the method of distribution; it is enough to say that it is settled that if the state law on the subject of recovery of damages in the event of the death of an employee and on the subject of the method of distribution of such damages is in conflict with the Federal law, the latter is controlling. (See *Taylor v. Taylor*, 232 U. S., 363, 58 L. Ed., 638).

Section 9 of the Federal act, as amended in 1910, provides for the survival of an employee's action for personal injury in the event of his subsequent death by reason of such injury. (*St. Louis etc. Ry. Co. v. Craft*, 237 U. S., 648, 59 L. Ed., 1160.) A similar provision is found in Section 4 of the New Jersey act concerning executors. (Vol. 2, Comp. Stat. of New Jersey of 1910, page 2260.) Prior to the amendment of 1910 the Federal statute of 1908 did not permit such recovery and hence it was held that no such recovery could be had even though the State law permitted it. (*St. Louis etc. Ry. Co. v. Hesterly*, 228 U. S., 702; 57 L. Ed., 1031.)

Another conflict between the New Jersey statute and the Federal satute is found in the measure of damages. In the case of an injury resulting in death the damages to the widow or next of kin are determined by the pecuniary loss. Substantially the same rule would be applied under Section I of the New Jersey Statute, except that, as above shown, there might be a difference in the beneficiaries to whom the damages are payable; but under Section II of the New Jersey statute the damages in case of death are determined by the provisions of the schedule in paragraph 12—being a certain percentage of the wages varying according to the number of dependents, payable for a period of three hundred weeks with a maxi-

mum of $10 per week and a minimum of $5 per week.

In cases of personal injuries the compensation to employees under the Federal law would be determined by the jury as at common law; and the same rules would apply in cases brought under Section I of the New Jersey statute; but under Section II the compensation is determined by the provisions in the schedule of paragraph 11, being 50% of the wages received at the time of injury for a varying number of weeks according to the nature of the injury and the disability resulting therefrom, with a maximum of $10 per week and a minimum of $5 per week.

A further conflict between the Federal law and the State law is found in the provisions relating to insurance and relief benefits. Section 5 of the Federal act permits the carrier to set-off any sum it has contributed or paid to any insurance or relief benefit or indemnity, etc. The New Jersey act has no provision permitting the carrier to do this; the only provision on this subject is that "the receipt of benefits from any association, society or fund to which the employee shall have been a contributor shall not bar the recovery of damages by action at law or the recovery of compensation under Section II hereof" (paragraph 23, clause 5).

A further conflist between the Federal law and the State law as construed by the New Jersey Court of Errors and Appeals in the present case is found in the method of enforcing the claims of employees and in defending the rights of employers. If the Federal statute is to be held applicable only to those interstate cases where negligence is proved, and if the State compensation statute is to be held applicable to those cases

where there is no negligence, the practical question still remains, who is to determine the fact of the existence or of the absence of negligence upon which the enforcement of the remedy and the defense of the right depends. The question of negligence under the Federal law must be determined by a common law court and jury—either by the jury in the event of disputed facts or by the trial court if there is no dispute of fact on the question of negligence. But under Section II of the New Jersey statute the compensation is given in all cases "without regard to the negligence of the employer"; and in the event of a dispute as to claims for compensation the claim is submitted to a special statutory tribunal created by the statute, to wit, one of the judges of the Courts of Common Pleas of the several counties of the State. Suppose that such statutory tribunal, in a case where the evidence shows without dispute that the carrier was engaging and that the employee was employed in interstate commerce, should conclude that the accident resulted from negligence. Then under the ruling in the present case he would be required to dismiss the petition and remit the employee to his rights under the Federal statute, and that, too, notwithstanding the State statute expressly provides that compensation "shall be made" without regard to negligence. In such a case the question of the presence or absence of negligence is determined by this special tribunal and not by the common law courts whether Federal or State.

Suppose that in another such case there is a dispute in the evidence not only upon the question of negligence, but upon the question of whether the carrier was engaging and the employee was employed in interstate commerce within the mean-

ing of the Federal statute. This fundamental question of fact would also have to be decided by this special tribunal and its decision under paragraph 18 of the statute is said to be "conclusive and binding." But the carrier is entitled, in the event of a dispute of fact as to the application of the Federal statute and as to the causal negligence thereunder to have those questions determined by the common law courts, sitting with the aid of a jury. We are not now contending that the New Jersey statute as construed in the present case is unconstitutional as depriving the defendant of its right of trial by jury, but are merely calling attention to those cases as illustrating the necessary conflict between the State law and the Federal law with respect to the determination of the rights and liabilities of the respective parties thereunder.

Suppose still a third case, wherein an injured employee brings suit in a common law court to recover damages under the Federal act. The court or the jury, as the case might be, decides either that the Federal statute does not apply on the facts or that the facts do not show negligence, and hence that the employee is not entitled to recover. These are exactly the same questions as were involved in the first and second cases, but now we find that these questions, instead of being decided by the tribunal created by the State statute, are determined by the common law court.

So far as the foregoing provisions of the New Jersey statute are concerned there can be no doubt that they are ineffective, because they are in conflict with the provisions of the Federal statute on the same subjects.

But it is said by the New Jersey Court of Errors and Appeals in the present case:

> "What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, but a contractual obligation created by Section 2 of our Workmen's Compensation Act with the consent of both employer and employee, and which exists although no negligence can be imputed to the employer. And this we consider she is entitled to do in the absence of any averment by her, or any proof offered, or any admission made by the defendant company showing that the death of her decedent resulted from defendant's negligence, and thus created a liability against it under the Federal statute. No such averment is contained in her petition; no such admission appears in the defendant's answer; and no proof of defendant's negligence was offered by either party" (page 19 of Record).

In reaching this conclusion that Court followed the reasoning of the New Jersey Supreme Court in the *Rounsaville* case (87 N. J. L., 371, 94 Atl., 392), where it was said:

> "The Federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. No new right of action is given. All that is done is to take away certain defenses which had come to be thought unjust. The legal liability of the employer under the act does not depend upon the terms of the contract of service and is neither increased nor diminished thereby. The amount of the pecuniary liability is in no way regulated or limited. The act applies only to certain classes of employers. In all these respects the Workmen's Compensation Act differs. Liability thereunder is contractual, and, while the contract liability is implied from silence, either party is at liberty to adopt or reject the statutory contract. A new right of action is given of a character unknown to our law,

> at least for several centuries. The liability of the employer depends, not on any fault of his own or his servants, but on whether, by act or by silence he has adopted the statutory terms. The amount of his pecuniary liability is fixed by statute and not by the verdict of a jury."

We submit that this argument is fallacious for several reasons. In the first place it assumes that Congress did not intend by the enactment of the Federal statute to cover the entire field of the liability of carriers by railroad to their employees in interstate service. This assumption is contrary to the repeated conclusions of this Court and other courts in decisions discussing this very statute. (See cases cited under subheads (B) and (C)).

In the second place it assumes that "a mere difference in the theory or recovery upon which the two acts are based is tantamount to a difference in subject matter." (Harvard Law Review, February, 1916, page 42.)

So far as the scope of the New Jersey Workmen's Compensation Act is concerned, it covers the same field as that covered by actions ex delicto prior to the passage of said Act. There is no better evidence of this than the title of the Act itself, to wit (italics ours), *"An Act prescribing the liability of an employer to make compensation for injuries* received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating the procedure *for the determination of liability and compensation thereunder."*

These questions were the important questions in former tort actions for personal injuries or death. The questions presented to the jury were those relating to the liability of the employer to make compensation for injuries and the determina-

tion of the liability and compensation therefor. All the jury had the right to consider was the liability and the compensation to the injured employee or the personal representatives of the employee in case of death. It did not have the right to enter the field of conjecture or speculation as to allowance for mental anguish of the relatives of the decedent by reason of the death, or for punitive damages, or what not, but it was limited to awarding a verdict as "compensation" for the injuries suffered. The effort of the State Legislature by its implied contract, and by the alteration of the terminology of the cause of action from an action ex delicto to an action ex contractu, and of the courts so to term the same, certainly cannot make this action cover a different field from that covered by Congress. The field is broader than the mere remedy by which the end to be desired is accomplished.

In the third place, it assumes that by the Federal statute it was the purpose of Congress to "impose" liability in certain cases, and that therefore as to all other cases there was no such purpose. But the Federal Act does not attempt to impose liability; it is merely declaratory of the common law with respect to the negligence of the carrier in interstate service and removes or limits certain defenses which would otherwise have been available at common law.

> "The acts of Congress regulating the liability of railroads to their employees do not affect the cause of action in any way, but abolish certain defenses, such as contributory negligence and assumption of risk. This is entirely consistent with previous (Federal) legislation limiting the extent of the employer's liability for the cause of action" (*The Passaic,* 204 Fed., 266, 268).

In the fourth place, it assumes that in *all* cases where the Federal Act affords no remedy the injured employee or his representative can enforce a remedy given by the state statute. On this point the New Jersey Court of Errors and Appeals said:

> "It cannot be that where the Federal Act affords no remedy—that is, where the death of the employee occurs under such circumstances that no liability is imposed on the carrier by that act—the widow cannot enforce a remedy which is given to her by a state statute" (p. 19 of Record).

If this reasoning is sound, then in every case where there was no remedy under the Federal statute the employee if injured or his dependents, in a case of death, would be entitled to receive compensation under the state statute. But it has been conclusively settled by this Court that there are many cases arising under the Federal statute in which the employee cannot receive compensation or enforce the remedy of the Federal statute because recovery is barred by the defense of assumption of risk.

Southern Ry. Co. v. Crockett, 234 U. S., 725; 58 L. Ed., 1564;
Yazoo, etc., R. R. v. Wright, 235 U. S., 376; 59 L. Ed., 277;
Toledo, etc., R. Co. v. Slavin, 236 U. S., 454; 59 L. Ed., 671.

In the class of cases of which the foregoing are illustrations there can be no recovery at all under either the State or the Federal statute even under the decision of the New Jersey Court in the present case—none under the State statute, because the accident resulted from negligence, and none

under the Federal Act, because the risk was assumed by the employee.

Finally, the argument of the New Jersey Court assumes that Section I and Section II of the New Jersey statute may be considered independently of each other. It is true that Section II does not in terms refer to Section I, but both sections are enacted as essential parts of the same statute. The fiction of an implied contract provided for in paragraph 9 of Section II is obviously a mere subterfuge to compel employers to operate under Section II rather than to serve notice thereunder, and thereby submit themselves to the pains and penalties of Section I. It may be that in a case where the point is raised it would be held that the New Jersey statute, though elective in form, so far as the compensation feature is concerned, is compulsory in effect, and is therefore unconstitutional.

See

Ives v. Southern Buffalo Ry. Co., 201 N. Y., 271; 94 N. E., 431;

Middleton v. Texas, etc., Co., 178 S. W., 956; 185 S. W., 556 (Tex.);

State Journal Co. v. Workmen's Compensation Board, 170 S. W., 1166; L. R. A., 1916 A, 389; 172 S. W., 674 (Ky.);

Greene v. Caldwell, 186 S. W., 648 (Ky.);

Victor Chemical Works v. Industrial Board, 113 N. E., 173 (Ill.).

This point is not involved in the present case, but we call attention to it merely as illustrating the argument that Sections I and II of the New Jersey statute must be considered as parts of one

whole. The two together form a complete scheme of compensation, but Section II standing by itself is incomplete. The implication specified in paragraph 9 of Section II that the provisions of said section shall be presumed to have been accepted in the absence of notice to the contrary is based upon the assumption that if the provisions of Section II do not apply, then the provisions of Section I shall apply. A necessary part of the consideration of the contract implied in said Section II is that either party may operate under Section I, but Section I, by reason of the fact that in the aspects hereinbefore set forth is inconsistent with, and covers the same field as, the Federal statute, is superseded by the latter, and the result therefore is that if the interstate employer desires to serve the notice specified in paragraph 9 in order that he may be relieved from the obligation of making compensation without regard to negligence, as provided in Section II, and thus place himself under the provisions of Section I whereby (although he is deprived of certain defenses) it is still necessary for the injured employee to prove negligence—the employer, the moment he brings himself under Section I by serving the notice specified in Section II, suddenly finds himself operating—not under Section I as he had supposed—but under the Federal Employers' Liability Act, which admittedly supersedes that part of the state law and which differs therefrom in certain material respects. We therefore have the anomalous situation, that where an interstate employer serves notice under Section II, thinking that he thereby comes under Section I, he no sooner comes under Section I than he finds he is immediately ousted therefrom and is compelled to operate under the terms of

the Federal statute—this result necessarily following from the fact that Section I is superseded by the Federal statute.

Section II assumes that the employer and the employee have made a binding contract, but if one of the essential parts of the contract fails then the contract itself is unenforceable.

> "There cannot be a statutory contract which fixes the liability of parties unless the statutory requirements are accepted and legally enforcible in all its parts. Otherwise that mutuality or agreement of minds, so essential in all valid contracts, would be lacking."

(Opinion of Warren Common Pleas in *Rounsaville* case, 37 N. J. Law Journal, 295, at page 299.)

That the two sections of the New Jersey statute must be considered as one is shown by the language of the statute itself. Paragraph 24 reads as follows (italics ours):

> "24. In case for any reason any paragraph or any provision of this act shall be questioned in any court and shall be held to be unconstitutional or invalid, the same shall not be held to affect any other paragraph or provision of this act, *except that Sections I and II are hereby declared to be inseparable,* and if either section be declared void or inoperative in an essential part, so that the whole of such section must fall, the other section shall fall with it and not stand alone. Section I of this act shall not apply in cases where Section II becomes operative in accordance with the provisions thereof, but shall apply in all other cases and in such cases shall be in extension of the common law."

The inseparable union between Sections I and

II is indicated by the decision of the New Jersey Supreme Court in the *Sexton* case, *supra* (affirmed without further opinion, so far as this point is concerned, by the New Jersey Court of Errors and Appeals in 86 N. J. Law, 701) wherein it is said:

> "The proceedings under review are not under Section I of the act. But Sections 1 and 2 providing two entirely different schemes—one regulative of the common law, and the other purely the creature of statute—are so interwoven and constitute so completely one single plan that it is unlikely that if Section 1 is bad, the legislature intended that Section 2 should stand. Indeed, the contrary is expressly provided in paragraph 24 of the act. It is, therefore, necessary to consider the objections raised, as they may be applicable to either section."

If Sections I and II are "inseparable," how is it possible to permit recovery of compensation under Section II in interstate cases wherein the employer cannot elect to avail himself of the provisions of Section I because the moment he attempts to do so by serving the notice provided in Section II he finds that he is operating under the Federal law. The result of the construction of the State and Federal statutes adopted by the New Jersey Court of Errors and Appeals in the present case is that in this respect among others it deprives the carrier of the equal protection of the laws and deprives it of its property without due process of law, contrary to the Fourteenth Amendment. For further discussion of this, see Point III.

In this connection we call attention to the provision of paragraph 8 of Section II, which provides that the agreement whereby the provi-

sions of Section II are accepted "shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in Section II of this act, and an acceptance of all the provisions of Section II of this act."

The intent of this part of the statute obviously is, in cases coming under Section II, to prohibit a recovery under the form of liability regulated in Section I. But the latter is the same as the common law liability declared and limited by the Federal statute; paragraph 8, therefore, requires a surrender of the common law rights declared and limited by the Federal statute.

Turning to Section 5 of the Federal Act, we find that Congress on the other hand has declared "that any *contract,* rule, regulation or *device whatsoever,* the purpose and intent of which shall be to enable any common carrier to exempt itself form *any* liability prescribed by this act, shall to that extent be void." If paragraph 8 of Section II of the Compensation Act, which we have quoted above, is not designed to enable an employer to exempt itself from every liability except that set forth in that section, it is hard to conceive of a provision which could do so.

This Court sustained the constitutionality of the Federal Act in so far as Section 5 of said act is concerned in the case of *Phila., etc., R. R. Co. v. Schubert,* 224 U. S., 603; 56 L. Ed., 911. The Court therein said (italics ours):

> "The evident purpose of Congress was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regula-

> tion, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act.' It includes *every variety* of agreement or arrangement of this nature; and stipulations contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms." (p. 611).

Other cases holding that a release of the carrier from liability for injuries, whether such release be in the form of a rule of a relief department, or in some other form, is void under Section 5 of the Federal statute, are:

> *Hartman v. Chicago, etc., R. Co.*, 182 S. W., 148 (Mo.);
> *McNamara v. Washington Terminal Co.*, 35 App. D. C., 230;
> *Potter v. Baltimore & O. R. Co.*, 37 Wash. L. R., 466;
> *Baltimore & O. R. Co. v. Gawinski*, 197 Fed., 31;
> *Herring v. Atlantic Coast Line R. Co.*, 168 N. C., 555; 84 S. E., 863;
> *Hogarty v. Phila. & R. R. Co.*, 245 Pa., 443; 91 Atl., 854;
> *Wagner v. Chicago & Alton R. Co.*, 239 U. S., 452; 60 L. Ed., 379;
> *Burnett v. Atlantic Coast Line R. Co.*, 163 N. C., 186; 79 S. E., 414 (reversed on other grounds, 239 U. S., 199; 60 L. Ed., 226);
> *Taylor v. Wells Fargo & Co.*, 220 Fed., 796;
> *Rief v. Great Northern R. Co.*, 126 Minn., 430; 148 N. W., 309.

The two statutes are thus in direct conflict

upon the question of the surrender of all other forms of recompense for injuries, and in such case the State enactment must give way to the Federal.

Paragraph 8 of Section II of the State Act, so far as it is applicable to interstate cases, is therefore void, both because it is in conflict with Section 5 of the Federal Act, and also because such a provision is expressly declared to be void by said Section 5.

Paragraph 8 is an essential part of the provisions of Section II of the New Jersey Act; as it is void because in conflict with Section 5 of the Federal Act then for this reason Section II of the State Act should be held inapplicable to interstate cases.

An illustration of the inconsistencies between the New Jersey statute and Section 5 of the Federal statute is found in the case of *West Jersey Trust Co., Admr., v. Phila. & R. Ry. Co.*, 88 N. J. L., 102; 95 Atl., 753, wherein the New Jersey Supreme Court held that the New Jersey statute superseded a previous arrangement between the carrier and the injured employee, for his admission into a railroad relief association. It was held that a release by the employee in his lifetime contained in his application for such admission did not operate as a bar to proceedings by the representative of the deceased employee brought under the compensation act. Under Section 5 of the Federal Act, though such a release would not operate as a bar, yet the carrier would be entitled to set-off any sum it had contributed to such relief association—a privilege to which it is not entitled under the New Jersey statute.

The New Jersey Court of Errors and Appeals

bases its decision in the present case upon the theory that the contract which is implied between the parties by paragraph 9 of the New Jersey statute may be limited to non-negligent accidents. This limitation necessarily inheres in the decision because the contract is said to be applicable only to cases of non-negligent accidents; so far as negligent injuries are concerned the Federal statute applies and controls. But the New Jersey statute expressly covers all injuries "without regard to the negligence of the employer," and therefore the decision under review in the present case practically amounts to an amendment of the New Jersey statute by striking therefrom the important economic principle by which all compensation statutes are sought to be justified, namely, that industrial accidents should be considered a part of the running expenses of the employers' business and should be compensated without regard to negligence.

> "The industry itself was the primal cause of the injury and, as such, should be made to bear its burdens." (Opinion of the Supreme Court of Washington construing the Compensation Act of that State in *Peet v. Mills*, 76 Wash., 437; 136 Pac., 685; cited by this Court in *Northern Pac. Ry. Co. v. Meese*, 239 U. S., 614; 60 L. Ed. 467.)

The absence of negligence cannot be a decisive test in many cases of interstate employment. For example, what shall be done with a case of an accident arising *without* negligence but due to a violation by an interstate carrier of some provision of the Federal Safety Appliance Act? It is settled by numerous decisions of this court that if the Safety Appliance Act be violated and if such violation is the proximate cause of the acci-

dent an interstate employee is entitled to recover damages even though the defective condition of the safety appliance arose *without* negligence. In other words, recovery is allowed in such a case *without regard to negligence of the carrier.*

In *Texas & Pacific R. Co. v. Rigsby,* 241 U. S. 33, 60 L. Ed., 874, the court said:

> "Plaintiff's injury was directly attributable to a defect in an appliance which, by the 1910 amendment, was required to be secure, and the act must therefore be deemed to create a liability in his favor, unless it be beyond the power of Congress under the commerce clause of the Constitution to create such a liability in favor of one not employed in interstate commerce."

Again:

> "The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition." (Citing cases.)

In *San Antonio etc., R. Co. v. Wagner,* 241 U. S. 476, 60 L. Ed. 1110, the court said, after referring to the *Rigsby* case:

> "If this act (Safety Appliance Act) is violated, the question of negligence in the general sense of want of care is immaterial."

In *Spokane etc., R. R. v. Campbell,* 241 U. S. 497, 60 L. Ed. 1125, the court said:

> "It is, of course, settled that if the equipment was in fact defective or out of repair, the question whether this was attributable to the company's negligence is immaterial."

Under this ruling numerous cases arise in which the plaintiff's right of recovery is based upon the

Safety Appliance Act. In the *Rigsby* case, *supra,* the court held that there was liability under the Safety Appliance Act (in case of an injury resulting from a violation thereof) even though the employee was not himself employed in interstate commerce at the time of the accident—thereby extending the principle of *Southern R. Co. v. United States,* 222 U. S. 20, 56 L. Ed. 72 (an action brought to recover penalties for violation of the statute) to a case of personal injury resulting from violation of the statute. Again quoting from the *Rigsby* case:

> "It is argued that the authority of that case (i. e., *Southern R. Co. v. U. S.*) goes no further than to sustain the penal provisions of the act, and does not uphold a right of action by an employee injured through a violation of its provisions, unless he was engaged in interstate commerce. That the scope of the legislation is broad enough to include all employees thus injured, irrespective of the character of the commerce in which they are engaged, is plain. The title of the act, repeated in that of each supplement, is general: 'An Act to Promote the Safety of Employees and Travelers,' etc.; and in the proviso to §4 of the supplement of 1910 there is a reservation as to 'liability in any remedial action for the death or injury of any railroad employee.' None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee: but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the employers' liability act, has never been doubted. (Citing Cases.) A disregard of the commands of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied,

according to a doctrine of the common law expressed in 1 Comyn's Dig. title, 'Action upon Statute' (F), in these words: 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (Per Holt, Ch. J., Anonymous, 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium*. See 3 Bl. Com. 51, 123; *Couch v. Steel*, 3 El. & Bl. 402, 411, 23 L. J. Q. B. N. S. 121, 125, 2 C. L. R. 940, 18 Jur. 515, 2 Week. Rep. 170. The inference of a private right of action in the present instance is rendered irresistible by the provision of §8 of the act of 1893 that an employee injured by any car, etc., in use contrary to the act, shall not be deemed to have assumed the risk, and by the language above cited from the proviso in §4 of the 1910 act."

But the confusion thus resulting from the present construction of the New Jersey statute is even worse confused when we look at Section 7 of the State law. Under the construction of the Court of Errors and Appeals in the instant case the right of an employee to receive compensation under the state law in an interstate accident depends upon the absence of negligence on the part of either the carrier or its employees—which negligence would of course give such injured employee the right of recovery under the Federal statute. Aside from the question of the absurdity of requiring a defendant to prove its own negligence in order to escape liability, we find that under Section 7 of the New Jersey statute compensation is required to be made "without regard to the negligence of the employer." In other words, the very ground upon which the New Jersey Court of Errors and Ap-

peals held that the right to receive compensation under the state law depends is by that self-same law a matter which is expressly removed from the consideration of the tribunal by whose judgment the compensation is to be determined.

We therefore have the extraordinary result that the New Jersey Court of Errors and Appeals has said that the right of recovery in an interstate accident depends upon a matter which the statute says is to be disregarded.

If the construction of the New Jersey Compensation Act by the Court of Errors and Appeals of that state is correct, we have this peculiar situation; first, in interstate accidents due to negligence on the part of the carrier or its employees recovery must be sought under the Federal Employers' Liability Act; second, in interstate accidents arising without negligence on the part of the carrier or its employees recovery *may* be had under the New Jersey Compensation Act, *provided* the accident did not result from a violation of the Federal Safety Appliance Act. In the latter event, even though the accident happened *without* negligence, there can be no recovery under the New Jersey Compensation Act; but the injured employee or his representative after being driven from one Federal law to the State law is driven back again from the latter law to another Federal law.

If it be said that under the elective scheme of the New Jersey statute the carrier has elected to make compensation in interstate accidents arising without negligence, the answer is that it cannot be presumed that the carrier has elected to decide between Section II. of the New Jersey statute (in non-negligent interstate cases) and Section I. of the New Jersey statute, because it is

impossible to make such an election by reason of the fact that if the carrier does serve notice under Section II. thereby expecting to come under Section I, the carrier then finds itself operating under the Federal statute instead of under Section I. There is an admitted conflict between Section I. and the Federal statute and no one claims that the Federal statute does not supersede Section I. Hence the presumption that arises by reason of the failure to serve notice under Paragraph 9 of Section II. of the New Jersey statute must be limited to *intra*state cases.

We therefore submit that the decisions of this court, the necessary implications from the Federal statute itself, the message of the President and the Reports of Committees concerning it, and the practical impossibility of concurrent operation of the two statutes in interstate cases due to the numerous conflicts and inconsistencies between them, all show that it was the purpose of Congress to cover the entire field of the regulation of the liability of interstate carriers to their employees while employed in interstate commerce.

POINT III.

The New Jersey Statute as construed by the Court of Errors and Appeals of that State in the present cause violates the fourteenth amendment of the Federal Constitution in that it denies to the plaintiff-in-error the equal protection of the laws and deprives it of its property without due process of law.

We have attempted to show under Point II that the decision of the Court of Errors and Appeals of New Jersey, holding that compensation may be made under the State law in the case of an accident resulting without negligence is erroneous. As bearing upon this contention, and in support of the argument in behalf of the plaintiff-in-error, we now further submit that if such construction be adopted, the necessary conclusion is that the New Jersey statute is unconstitutional, as violative of the Fourteenth Amendment.

This Court, in considering the constitutionality of a State law, will wait until the State court has given the law a construction which may justify an attack against it as unconstitutional. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S., 531; 58 L. Ed., 713. *Chicago, etc. Ry. Co. v. Anderson* (Opinion of this Court filed December 18, 1916).

But when the State court has given a statute such a construction, then this Court will consider whether that construction renders the law obnoxious to the Federal Constitution.

> "It is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the

duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess, of its constitutional authority."

Plymouth Coal Co. v. Pennsylvania, supra.

It is elementary that, whenever possible, statutes will be so construed as to harmonize with constitutional provisions. 8 Cyc., p. 802 and cases cited. If, therefore, the construction of the New Jersey statute adopted by the New Jersey Court violates the Federal Constitution, that fact is a strong additional reason for adopting some other construction, if possible, which does not violate the Constitution.

In the present case, the defendant is not asserting that the New Jersey statute, *when properly construed*, is invalid because contrary to any provisions of the Federal Constitution. But it does claim that the construction of the New Jersey statute adopted by the Court of Errors and Appeals violates the Fourteenth Amendment in that such construction denies to the defendant the equal protection of the laws and deprives the defendant of its property without due process of law.

A. Denial of Equal Protection.

The classification of corporations according to their business and subjecting them to different rules of liability, dependent upon the nature of the business, does not deny the equal protection of the laws. 8 Cyc. 1061, 2.

Statutes may therefore be passed which are applicable to railroads as distinguished from other employers. Examples of such statutes are considered in the following, among other, cases:

Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205; 32 L. Ed. 107;

Louisville & N. R. Co. v. Melton, 218 U. S. 35; 54 L. Ed., 921;
Mobile etc., R. Co. v. Turnipseed, 219 U. S. 35, 55 L. Ed. 78;
Chicago, etc., R. R. Co. v. McGuire, 219 U. S., 549; 55 L. Ed., 328;
Chicago etc. R. Co. v. Hackett, 228 U. S. 559; 57 L. Ed. 966.

But the validity of such statutes depends upon the fact that they apply to all railroads and apply to all persons under the same conditions. The principles by which the validity of such legislation is determined are set forth as follows in the *Mackey* case, *supra* (italics ours):

> "And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, *if all persons brought under its influence are treated alike under the same conditions.* * * * Such legislation is not obnoxious to the last clause of the 14th Amendment, if *all* persons subject to it are treated alike under *similar* circumstances and conditions in *respect both of the privileges conferred and the liabilities imposed.* * * * The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, *and all railroad corporations* are *without distinction*, made subject to the *same* liabilities."

The construction of the New Jersey statute adopted by the New Jersey court in the present case does not classify carriers by railroads according to the *railroad* business and the hazards thereof, but according to whether the particular act of commerce in which it is engaging and in which its employee is employed at the moment of an accident is inter or intra-state. If it is intra, then compensation must be made in every case "without regard to the negligence of the employer" but if inter, then compensation must be made under the State law in those cases where there is no negligence and under the Federal law in those cases where there is negligence.

If the amount required to be paid in both inter and intra-state cases was substantially the same, and if it were determined in the same manner under both the State and the Federal statutes, possibly there would be no denial of equal protection. But as shown under Point II, subhead (F), there are important differences between the State and the Federal Acts in both of these respects.

Aside from the power of Congress to legislate as to the rights and liabilities of master and servant under the commerce clause of the Constitution, we submit there is no reasonable basis for a classification of the liability of a carrier by railroad which is made dependent solely upon the question of whether the injury or death resulted in inter, as distinguished from intra-state business.

The two classes of traffic are "interdependent" in points of movement and safety (*Illinois Central R. R. v. Behrens,* 233 U. S. 473, at page 477). The hazard does not depend upon whether the particular movement happens to be inter or intra-state. Both are equally hazardous, or either may

be more so than the other, according to the circumstances of the particular operation. How, then, can there be any reasonable ground to distinguish between the two kinds of business by imposing a rule of liability in the one case different from that in the other? How can an interstate carrier be reasonably required to measure its liability by a rule different from that imposed upon an intra-state carrier?

In those cases wherein state statutes have been considered which were passed prior to the Federal legislation on this subject, the constitutionality of the statutes has been sustained on the theory that railroad employers constituted a special class due to the peculiar nature of the business. But could any one say that such statutes would have been sustained if they had attempted to prescribe one rule of liability for an interstate railroad and another for an intrastate railroad, or one rule for a railroad while it was engaging in interstate business and another rule for the same railroad while it was engaging in intrastate business, although in both cases the employees are "working side by side" (*American Radiator Co. v. Rogge*, 86 N. J. L., 436).

Moreover, so far as concerns employees employed in interstate commerce an interstate carrier cannot *elect* under paragraph 9 of the New Jersey statute whether it will operate under Section II or Section I of that statute, because if it elects to go under Section I, that moment it comes under the Federal Act. Hence, as to such employees an interstate carrier can elect only between Section II of the State law and the Federal statute. But the same interstate carrier, as to employees who are not employed in interstate commerce, may elect between Sections II and I, and an

intrastate carrier engaging in intrastate business may make the same election.

Hence, the interstate carrier, so far as concerns employees who are working in interstate commerce, is not on an equality with other carriers in interstate commerce nor with intrastate carriers.

The results are:

1. In cases where there is no negligence the intrastate carrier pays the amount of compensation prescribed by the State Act; the interstate carrier makes similiar compensation.

2. In cases where there is negligence, the intrastate carrier continues to pay under the state law. But the interstate carrier pays—not the amount which the state law fixes—but whatever amount a jury may find as damages (subject to the defence of assumption of risk in appropriate cases) and *in addition*, under the reasoning in the present case and in the decision of the New Jersey Supreme Court in the *Rounsaville* case, the interstate carrier also pays the amount of compensation required by the state law; thereby resulting in a double recovery.

It therefore follows that the interstate carrier is deprived of the equal protection of the laws in that it has not the same election as the intrastate carrier and is subjected to a greater burden than the intrastate carrier.

A recent case which illustrates the foregoing argument is *Jarvis v. Dagget*, 151 Pac., 648, where the Supreme Court of the State of Washington held that to construe the Compensation Act of that State to be applicable to cases falling within the admiralty jurisdiction would deprive the employer (the vessel owner) of the equal protection of the law because under such construction of

the statute such employer would have the burden of paying the premiums required by the statute, but at the same time would not be relieved from liability in admiralty.

Still another inequality which results from the construction of the New Jersey statute by the Court of Errors and Appeals in the present case is found in the difference between the State law and the Federal law with respect to contributions on the part of the carrier to insurance or relief benefits. Under Section 5 of the Federal law the carrier may set-off any sum it has contributed or paid to any insurance or relief fund, but under the New Jersey statute the carrier does not get the benefit of such contribution or payment. See *West Jersey Trust Co., Admr., v. Phila. & R. Ry. Co.*, 88 N. J. L. 102; 95 Atl. 753.

This inequality exists not only as between interstate carriers and intrastate carriers, but also as between interstate cases of accidents resulting from negligence and interstate cases resulting without negligence; in those interstate cases that result from negligence the carrier has the benefit of the set-off permitted under section 5 of the Federal Act, because admittedly the Federal Act applies to such cases—but in interstate cases of accidents resulting without negligence the carrier does not have the benefit of such set-off, because under the New Jersey statute the employee may recover the full amount specified in the schedules of the statute without allowance for contributions or payments to insurance or relief benefits. But it is a matter of common knowledge that payments to injured employees or their representatives or dependents from the insurance or relief benefits are made without reference to the question of whether the accident resulted from negligence. See *Staley v. Illinois Central R. Co.*, 109 N. E., 342, at p. 348.

B. Deprivation of property without due process.

In the case of *Sexton v. Newark District Telegraph Co., supra,* wherein the constitutionality of the present New Jersey statute was sustained as against the objections therein urged, it was said that the New Jersey statute did not take the property of the defendant without "due process" because the employer had the right to *elect* between Section II, providing for a definite payment of compensation irrespective of negligence, and Section I, removing certain common law defenses; and the statute was distinguished from that declared unconstitutional in the case of *Ives v. Southern Buffalo Ry. Co.*, 201 N. Y. 271, on the ground that the statute in the latter case was compulsory. See 84 N. J. Law, at p. 100.

Assuming this to be a sound distinction, the question still remains whether the New Jersey statute is valid in a case like the present where the interstate carrier employer is *deprived of this election* between Section II and Section I of the New Jersey statute, and is in effect prevented from making the choice specified in paragraph 9 of the New Jersey Act by reason of the fact that if it serves notice under that paragraph it then operates, not under Section I, but under the Federal statute. The very foundation of the decision in the *Sexton* case is that the employer has an election between Sections II and I of the New Jersey statute, but if the election no longer exists then the reasoning upon which the *Sexton* case is founded fails. The interstate employer may prefer to operate under Section I rather than be obliged to pay the compensation specified in Section II. But if it has not the right to make such election, dut to the fact that as soon as it gives notice

under Section II it comes under the Federal Act, then we submit it is deprived of its property without due process.

It is no answer to say that the interstate carrier, if it gives notice under Section II, is not harmed, because as a result of such notice it is obliged to operate under the Federal Act instead of under Section I of the New Jersey Act, for the reason that the Federal Act is in certain respects less burdensome than said Section I. The question is not whether the Federal Act does or does not impose as great a burden upon the interstate carrier, as does Section I, but rather whether the employer is deprived of its election to operate under Section I, if it wants so to do. Moreover, in some cases, the Federal Act may be more onerous than Section I of the New Jersey Act. For example, under the former, contributory negligence is in all cases only a partial defense, whereas under the latter, contributory negligence, in the sense of "willful" negligence, as defined in the statute, is a complete defense.

There is still another aspect in which we submit the carrier does not have due process. If the theory of the Court of Errors and Appeals in the present case is sound, that the rights of the parties depend upon the fact of the existence of a contract "presumed" pursuant to paragraph 9 of the New Jersey statute, and that an action by the employee based upon such contract is distinct from an action *ex delicto* based upon negligence, then an injured employee has the right to receive compensation under Section II in all cases "without regard to the negligence of the employer"; and *in addition,* in a case resulting from negligence, has the right to whatever damages a jury may give in proceedings under the Federal Act.

This results in a situation similar to that arising under the New York statute considered in the *Ives* case, *supra*. The constitutional objection declared in that case was that the statute made the employer liable to make compensation, irrespective of negligence, while at the same time continuing his liability at the election of the employee for injuries sustained from negligence as at common law.

On this same reasoning the compensation act of the State of Montana was declared void in the case of *Cunningham v. Northwestern Improvement Co.*, 44 Mont., 180; 119 Pac., 554. The statute under consideration in that case required the employer to make certain payments into a State insurance fund but left it liable to a suit at common law.

If it be said that the interstate carrier has the option to avoid the danger of a double recovery in cases of negligence by serving notice under paragraph 9 of the New Jersey statute, the answer is that the *only* way such employer *can* avoid such danger is by serving such notice; and it is therefore in effect *compelled* to serve the notice if it would avoid the danger, and is therefor deprived of its election to operate under Section II of the State statute, if it so desires.

If it be said, as suggested in the *Rounsaville* case, *supra*, that paragraph 8 of the New Jersey statute prevents such double recovery, the answer is that such provision conflicts with Section 5 of the Federal Act and is therefor unenforcible in interstate cases. (See Point II (F), (4)).

But the construction of the Court of Errors and Appeals inevitably leads to the further difficulty that if the tribunal by which the compensation is to be determined has no power to consider or to

decide the decisive point upon which the right of compensation depends, then the carrier is deprived of its property without due process of law because it has had no hearing whatever on this decisive point, and indeed the tribunal which in the first instance is called upon to decide that point is prevented from deciding it by the very language of the statute by which the tribunal is constituted.

Under paragraph 7 of the New Jersey statute compensation is required to be made "without regard to the negligence of the employer." The statute establishes the several judges of the Courts of Common Pleas in the respective counties of the State as the tribunal by which disputed questions are to be determined in the first instance. The procedure for the determination of such questions is set forth in paragraphs 18 and 20. These read as follows:

In case of dispute question submitted to court.

"18. In case of a dispute over, or failure to agree upon a claim for compensation between employer and employee, or the dependents of the employee, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding. * * *

Procedure in dispute.

"20. Procedure in case of dispute shall be as follows:

Petition to court.

"Either party may present a petition to said judge setting forth the names and residences of the parties and the facts relating to em-

As amended by Chapter 174, Laws 1913.

ployment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. This petition shall be verified by the oath or affirmation of the petitioner. Proceedings on behalf of an infant shall be instituted and executed by a guardian, and payment, if any, shall be made to such guardian.

Notice of hearing.

"Upon the presentation of such petition the same shall be filed with the clerk of the Court of Common Pleas, and the judge shall by order fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said petition. A copy of said petition and order shall be served as summons in a civil action and may be served within six days thereafter upon the adverse party. Within seven days after the service of such notice the adverse party shall file an answer to said petition, unless the court for good cause shall grant further time, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for a petition. Within thirty days after the final hearing the judge of the Court of Common Pleas shall file his determination.

Answer filed.

Hear witnesses.

"At the time fixed for hearing or any adjournment thereof the said judge shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. This determination shall be filed in writing with the clerk of the Common Pleas Court, and judgment shall be entered thereon in the same manner as in

Determination.

causes tried in the Court of Common Pleas, and shall contain a statement of facts as determined by said judge. The employer may once every month file receipt of payment, verified by affidavit that the receipts are accurate and true, with the clerk of the court, which shall be entered in satisfaction of the judgment to the extent of such payments. Subsequent proceedings thereon shall only be for the recovery of moneys thereby determined to be due, provided that nothing herein contained shall be construed as limiting the jurisdiction of the Supreme Court to review questions of law by certiorari. Costs may be awarded by said judge in his discretion, and when so awarded the same costs shall be allowed, taxed and collected as are allowed, taxed and collected for like services in the Common Pleas Court.

Subsequent proceedings.

As to costs.

"No agreement between the parties for a lesser sum than that which may be determined by the judge of the Court of Common Pleas to be due, shall operate as a bar to the determination of a controversy upon its merits, or to the award of a larger sum, if it shall be determined by the said judge that the amount agreed upon is less than the injured employee or his dependents are properly entitled to receive."

Agreement not a bar.

The jurisdiction of this tribunal cannot, of course, be extended beyond the limits specified by the statute under which it is constituted. It will be seen that there is nothing in the statute which gives such tribunal power to determine whether or not there was negligence on the part of the employer. The disputed questions upon which that tribunal is to pass are the nature and effect of the injuries, the fact of dependency or otherwise, the amount of compensation "according to the schedule," "the facts relating to employment" (which would include such fundamental jurisdictional

facts as to whether or not the injury was caused by accident and whether it arose out of and in the course of employment), the extent and character of the injury, the amount of wages received at the time of the injury, the knowledge of the employer or notice of the occurrence of the injury, and in certain cases (as provided in Par. 21) whether the compensation should be commuted to a lump sum, discounted at 5%, or should be paid from week to week. (See *Dunnewald v. Henry Steers, Inc.*, 95 Atl., 345.)

When these paragraphs are read in connection with Par. 7 it is plain that the statutory tribunal is given no jurisdiction to determine the question of the existence of negligence—and yet, according to the decision in the instant case, that is the vital point upon which liability to make compensation depends in interstate accidents.

In the present case according to the opinion of the Court of Errors and Appeals the right to compensation depends upon whether there was negligence on the part of the carrier or its employees. An examination of the record of the case will show the following:

1. The petition filed in the Hudson Common Pleas does not allege any negligence on the part of the carrier or its employees, neither does it allege there was *no* negligence; it merely charges that the petitioner's intestate was killed by an accident while in the performance of his duties (p. 5 of Record).

2. The answer admits or denies the various allegations of the petition and then sets up as a further defense that at the time of the accident the defendant was engaged in interstate commerce and the petitioner's intestate was employed by it in such commerce and that the rights of the parties

are determined exclusively by the Federal Employers' Liability Act. There is nothing in the answer which raises any question as to the absence or existence of negligence on the part of the carrier or any of its employes (p. 7).

Hence, so far as the issues before the court of first instance is concerned, *there was no issue made on the question of negligence.*

3. At the hearing of the cause the testimony was very brief and practically all of the essential facts were stipulated. Not a word was suggested in the testimony or on the stipulation as to whether or not the accident resulted from negligence. Hence, prosecutor had no *hearing* on that question, even if it had been made an issue in the cause (pp. 11-13).

4. In the "Determination" of the trial court not a word was said about the decisive point of whether or not the accident was due to negligence or whether it arose *without* negligence (pp. 9-11).

5. In the opinion of the New Jersey Supreme Court not a word was said on the question of negligence. That court said (italics ours):

> "The *sole* question is whether the act of Congress of the United States or the New Jersey Workmen's Compensation Act applies" (p. 15).

6. When we come to the Court of Errors and Appeals we then find *for the first time* that the question of right to receive compensation depends upon the existence of negligence—that court saying (italics ours):

> "When death results to an employee *without such negligence* being present as a producing cause either wholly or partly, the statute imposes no liability upon the carrier" (p. 19).

It will therefore be seen that in the present case neither the parties nor the lower courts raised the question of negligence. No one suggested until the case reached the Court of Errors and Appeals that the right to receive compensation depended upon negligence or the absence thereof. Hence, in the present case the defendant is deprived of its property without due process because it has had no hearing on the vital point upon which its liability turns.

If it be said that the defendant was not entitled to a hearing upon that point because the New Jersey Compensation Act provides that compensation is to be made without regard to negligence, then the answer (as shown above) is that the statute itself, under the present construction, is in violation of the Federal Constitution in that it imposes upon interstate carriers in interstate accidents an absolute liability to make compensation without affording it an opportunity to be heard on the point upon which its liability depends.

POINT IV.

The New Jersey Statute, as construed by the Court of Errors and Appeals of that State in the present cause, is an unconstitutional regulation of and an interference with interstate commerce.

Under the construction of the New Jersey statute, as adopted by the New Jersey Court of Errors and Appeals in the present case, a common carrier by railroad, engaging in interstate commerce, may be compelled to make compensation to its employees, employed by it in such commerce, in all cases of accidents resulting without negligence on its part or on the part of any of its of-

ficers, agents or employees—the amount of the compensation to be determined in accordance with the schedule and procedure prescribed by Section II of the New Jersey statute.

The Federal statute of 1908 was sustained as a regulation by Congress of interstate commerce on the ground that Congress had the power to regulate the relations of interstate carriers and their employees, and that the regulation of such relations had a substantial connection with interstate commerce.

But the State of New Jersey now says that *it* will undertake to regulate such relations and that interstate carrier employers by railroad doing business within the State so far as concerns accidents resulting without negligence are controlled by the provisions of the State Compensation Act.

This argument does not depend upon the claim set forth under Point II that Congress has in fact regulated the whole subject matter of the liability of carriers by railroad to their employees in interstate cases, but is entirely aside from that question. Let us assume for the moment that Congress had expressly provided in the statute of 1908 that the application of the statute should be limited to cases of accidents resulting from negligence, and that in cases of accidents resulting without negligence the several States might regulate the relations between an interstate carrier and its employees. Even under such circumstances, we submit that the New Jersey statute, as construed in the present case, would be invalid as a regulation of and an interference with interstate commerce. The question of what action on the part of a State amounts to such a regulation of interstate commerce as to be an unconstitutional interference therewith has been

considered in numerous cases. It is unnecessary to cite them at length. The cases to date are collated and classified in the *Minnesota Rate Cases*, 230 U. S., 352, at pp. 400-411; 57 L. Ed., 1511; 48 L. R. A. (N. S.), 1151.

The New Jersey statute expressly provides that Section I thereof shall not apply in cases where Section II becomes operative in accordance with the provisions thereof, but shall apply in all other cases (paragraph 24). This, of course, means that every railroad in the State must carry on business under the one or the other of these two sections unless the Federal statute of 1908 be construed as superseding the New Jersey statute in *all* interstate cases. But in the present case the State court says in effect that the State will regulate the liability of interstate carriers and their employees in all cases of accidents resulting without negligence. As to such cases, therefore, the business of the interstate carrier is burdened with the obligation of making compensation pursuant to the terms of Section II of the New Jersey statute.

We submit that the New Jersey statute as construed in the present case amounts to a regulation of and a burden upon interstate commerce. The effect of such construction is to place upon interstate carriers liability to make compensation in cases wherein otherwise no such compensation could be required. It in effect imposes a penalty upon interstate carriers in matters that arise out of interstate business. As was said in Central Law Journal, Vol. 82, p. 43, issue of January 21, 1916:

> "When Congress was legislating in the Federal Employers' Liability Act as to carriers in interstate commerce was it doing this

to put a limitation upon their liabilities for injuries in the performance of their functions? When, therefore, it prescribed that they should award an employee injured by their negligence, impliedly was it said no other penalty should be put upon them?

"If States go beyond this they put a burden on the instrumentalities of commerce, which Congress may have said they shall not bear. It might be deemed that these carriers would not be either so free or so able to serve the purposes of commerce as were they exempt from this burden."

The decision under review, if sustained, leads to endless inconsistencies and embarrassments.

Thus, the defendant in the present case, operates in the States of New York, New Jersey, Pennsylvania, Ohio, Indiana and Illinois. In New Jersey, under the present decision, it must make compensation under the New Jersey Compensation Act in all cases arising in New Jersey without negligence.

In the State of New York, according to the decision in the case of *Winfield v. New York Central R. R. supra,* it must make compensation under the terms of the New York statute in cases arising without negligence.

In Pennsylvania, Indiana and Ohio compensation acts are in effect but the question of their application to interstate accidents resulting without negligence has not as yet been decided.

In Illinois, on the other hand, in the case of *Staley v. Illinois Central R. R. supra,* it has been decided that the compensation act of that State does not apply to *any* case (whether caused by negligence or otherwise) of an employee injured while engaged in interstate commerce.

We therefore have the peculiar situation where

the defendant in two states is obliged to make compensation in interstate cases arising without negligence; in one State it is not obliged to make compensation in such cases, and in three other States it does not yet know what it is obliged to do in order to conform to the law.

But the embarrassing situation created by the rulings in different States on this subject is even worse confounded by the rulings on the question of extra-territorial jurisdiction of the tribunals established in the several States for the purpose of giving effect to State compensation statutes. Thus, it has been held in New Jersey that, although the contract of employment was made in New York, the New Jersey Compensation Act will be applied where the injury occurred in New Jersey and the contract of employment contemplated that the performance of the employee's duties would be required partly in New York and partly in New Jersey.

> *American Radiator Co. v. Rogge,* 86 N. J. L. 436, 92 Atl. 85 (affirmed 87 N. J. L. 314, 93 Atl. 1083).

It has also been held in New Jersey that the New Jersey statute would be applied to a case of an accident which happened in Pennsylvania, when the contract of employment was made in New Jersey.

> *Rounsaville v. Central R. R. Co.,* 87 N. J. L. 371, 92 Atl. 392.

In New York it has been held that the New York Compensation law will be applied to an accident which happened in New Jersey when the contract of employment was made in New York.

Spratt v. Sweeney & Gray Co., 168 App. Div. 403, 153 N. Y. Supp. 505, 9 Neg. & Comp. Cas. 918.

In *Kennerson v. Thames Tow Boat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916—A, p. 436, held that the Compensation Act of the State of Connecticut will be applied to the case of an accident that occurred on Raritan Bay, New Jersey, when the contract of employment was made in Connecticut.

These and other cases on the subject will be found collated in notes at 9 Negligence and Compensation Cases, p. 918, and L. R. A. 1916—A, p. 443.

Without attempting to discuss whether these cases have been correctly decided, it is apparent that the result is much confusion and uncertainty. To illustrate: The defendant in the present case has a division point at Port Jervis in the State of New York, where many men are employed in the railroad yards. This yard happens to be located about a mile from the state lines both of New Jersey and of Pennsylvania. Many of the men who work in the yard live across the state line of either Pennsylvania or New Jersey. Some of them are hired in New Jersey, others in Pennsylvania, others in New York. If the contract of employment is made in New York, and if, in the performance of such contract, a yard employee is injured in New Jersey while switching across the state line, what compensation law shall be applied? Shall the New York law be applied on the theory that the contract of employment was made in New York, or shall the New Jersey law be applied on the theory that the accident happened in New Jersey?

On the other hand, suppose the contract of employment happens to be made in New Jersey and

the accident happens in New York; shall the New Jersey statute be applied on the theory that the contract was made in that State, or shall the New York statute be applied on the theory that the accident happened in the latter State?

It is easy to enlarge even this confusion. To illustrate: Suppose the case of an engineer, whose contract of employment is made in New York, but in the course of his employment he has occasion to pass through other States such as New Jersey, Pennsylvania, Ohio, Indiana and Illinois. Suppose further that the original contract of employment contemplated that the performance of his duties would be partly in New York and partly in each of these other States. If an accident happened to him in Pennsylvania what law would be applied? If another accident happened to him in Ohio or Indiana or Illinois, what law would be applied? Shall we apply the law of the State of New York where the original contract was made, or shall we apply the law of the State where the accident happens?

According to some of the decisions he would be entitled to compensation under the law of the State where the contract of employment was made; according to other decisions he would be entitled to compensation under the law of the State where the accident happened. Can it be said that he would be entitled to compensation under the laws of *both* States? If, not, where shall the line be drawn, and what is to be the test?

This is a very practical question which is constantly arising on the lines of interstate railroads, as the laws of the several States in which Compensation Acts are in effect are substantially dissimilar with respect to the amount of compensa-

tion and the circumstances under which compensation will be allowed.

If it be said that this confusion is the necessary result of the conflict of laws among the several States which is inherent in the nature of our government, the answer is that *insofar as concerns interstate accidents* all such confusion and uncertainty can be removed by merely applying the Federal law to all interstate accidents regardless of whether or not they arise from negligence.

In the foregoing illustrations we have assumed that the accident in any particular case arose without negligence. If the accident was due to negligence, then the Federal law must be applied. Our present point is, that *unless* the Federal law is applied to all such accidents, regardless of negligence, then the construction of the State Compensation Act, as adopted by the Court of Errors and Appeals in the present case operates to impose an unconstitutional burden upon the interstate commerce of the defendant.

The situation is like that in the case of *South Covington Ry. v. Covington*, 235 U. S. 537; 59 L. Ed. 350 where, in setting aside part of the provisions of an ordinance regulating street cars running between Covington, Kentucky and Cincinnati, Ohio, the court said:

> "If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall v. DeCuir*, 95 U. S. 485, 489 'commerce cannot flourish in the midst of such embarrassments.'

> "We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of Federal regulation does not give the power to the State to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

So, in the present case, an employee in charge of a train running, let us say, between New York and Chicago, if he is injured in New York or New Jersey, without negligence, may compel his employer to make compensation according to the appropriate state statute, whichever that may be but if the accident happens after he has crossed the boundary line of the State of Illinois the carrier is not bound to make compensation.

The situation is similar to that described in the case of *Schuede v. Zenith S.S. Co.*, 216 Fed., 566, where it was held that the Ohio Employers' Liability Act did not apply to a maritime contract of employment. We quote therefrom as follows:

> "The plaintiff proceeds on the theory that the law of Ohio applies against the Minnesota corporation, and the Ohio jurisdiction attaches in the present case, because the accident happened in an Ohio tributary to the Lakes. There may be some doubt whether it is not the law of the Saxona's home port and the jurisdiction of Minnesota which control, if there is no Federal law applying (*Thompson Towing & Wrecking Association v. McGregor*, 207 Fed. 209; 124 C. C. A. 479); but, assuming that plaintiff's contention is right, then two consequences follow his construction of the saving clauses in section 24 and 256 of the Judicial Code, both provocative of inconvenience, inequality, inconsistency and almost absurdity:

"First. The defendant, for torts on contract committed by it of precisely the same character, and upon servants of precisely the same class, would be subject to as many varieties of responsibility, and would be compelled to vary its defenses as the laws pertaining to the incidents of service differ in the several places of accident. There are eight state jurisdictions bordering upon the waters in which the Saxona plies, and it is conceivable that eight seamen of the same class each might meet in his employment with an injury substantially of the same class in a port of each of such jurisdictions each claimant enjoying a common right of recovery under the maritime law or a different right under the local law.

"Second. A seaman would enjoy the option of a uniform contractual right under the law maritime, or to vary under local laws the incidents of the contracts as he proceeds from port to port and as he had occasion to invoke such rights. In Buffalo his contract would be one thing; in Cleveland, if the Ohio law differs from that of New York, it would have another phase; to change its color again in Detroit, Milwaukee, Duluth, Chicago, and Michigan City, if the laws of their several jurisdictions, respectively, offered peculiarities. These conditions, with all their inconveniences and inequalities and unnecessary burdens, are not compelled by the language of the saving clause in question and should be avoided in construing that provision."

The difficulties arising from the attempt of the State of New Jersey to regulate interstate commerce may be readily overcome if the supreme authority of Congress in dealing with the subject matter of the liability of carriers by railroad to their employees is recognized. This was pointed out in *Adams Express Co. v. Croninger,* 226 U. S. 491, at p. 505 (57 L. Ed. 314), where the court said:

"Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in *Southern Pacific Co. v. Crenshaw*, 5 Ga. App., 675, 687; 63 S. E. Rep., 865, where that Court said:

"'Some states allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them.'

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation

or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."

POINT V.

For these reasons the judgment of the Court of Errors and Appeals of the State of New Jersey should be reversed and the judgment of the Supreme Court of that State affirmed.

GILBERT COLLINS,
GEO. S. HOBART,
Counsel for Plaintiff-Error.

Appendix.

NEW JERSEY SUPREME COURT.

June Term, 1915.

EMMA W. HOPKINS, *Prosecutor,* *vs.* COURT OF COMMON PLEAS OF THE COUNTY OF UNION, et al., *Defendants.*	On Certiorari.

Argued June 1, 1915.

Decided June 28, 1915.

ABE J. DAVID, Esq., for Prosecutor.

JOHN F. REGER, Esq., for Defendant, Port Reading Railroad Co.

Before:

JUSTICES GARRISON, TRENCHARD AND BLACK.

Per Curiam:

The petitioner, Emma W. Hopkins, filed her petition in the Union County Court of Common Pleas, praying that compensation be awarded to her for the death of her husband Raymond G. Hopkins, under the Workmen's Compensation Act of New Jersey. It is admitted that Raymond G. Hopkins, the petitioner's husband, was on the eighth day of April, 1914, at Port Reading in this State, employed by the defendant, the Port Reading Railroad Company; that he was run over and killed by an engine of the defendant company. The defense was that the defendant company was a common carrier engaged in interstate commerce and that at the time of receiving the injuries causing his death, he was assisting in the move-

ment of cars, which were being made into a train engaged in interstate commerce, that by reason thereof the said Raymond G. Hopkins and the defendant company were not bound by nor subject to the New Jersey statute, but were bound by and subject to the provisions of an act of the United States Congress, relating to the liability of common carriers to their employees. The trial judge took this view of the facts and rendered judgment for the respondent, dismissing the petitioner's petition.

The essential facts are that the deceased was assisting the crew of engine No. 1409, in which he was employed as a brakeman, in the movement of ten empty coal cars. The crew is engaged in making up a train of empty coal cars for a return trip to the mines of Pennsylvania, which train was being made up in that part of the yard known as South Yard. The crew brought the ten empty cars from the old yard and were about to shunt them into the South Yard. The track was blocked by Engine No. 1504 which had just pulled in from Bridgeport, Penn. Another crew of Engine No. 787 was shifting some of these cars. Hopkins, during the movement of the ten cars, had alighted and when last seen alive was walking toward these cars, which his crew was handling and which had then come to a stop. He was run over by Engine No. 787 drawing the caboose and seven loaded cars which had been cut off from the Bridgeport trains, a maneuver incidental to the make-up of the interstate train drawn by Engine No. 1409.

Under this state of facts we think the ruling of the trial judge was correct. In the case of *Illinois Central R. R. Co. v. Behrens*, 233 U. S.,

473, 478, Mr. Justice Van Deventer speaking for the United States Court, said: "The true test is the nature of the work being done at the time of the injury." Tested by that rule, the judgment of the Common Pleas Court should be affirmed and it is hereby affirmed.

NEW JERSEY SUPREME COURT.

June Term, 1915.

REGINA LINCKS, Administratrix of HENRY W. LINCKS, deceased,
Petitioner-Defendant,
vs.
ERIE RAILROAD COMPANY,
Respondent-Prosecutor.
On Certiorari.

Argued June 3, 1915. Decided July 6th, 1915.

FRANK G. TURNER, Esq., for Petitioner-Defendant.

MESSRS. COLLINS & CORBIN, for Respondent-Prosecutor.

Before:

JUSTICES GARRISON, TRENCHARD AND BLACK.

Per Curiam:

The petitioner, Regina Lincks, filed a petition in the Hudson County Court of Common Pleas, stating that Henry W. Lincks was her husband; that he was killed on the Twenty-fourth day of September, 1914, while in the employ of the Erie Railroad Company at the terminal yards in Jersey City; his employment was that of an engine tender or laborer; that is, he filled cab lights, filled the steam gauge lights, the water glass lights and

the red and white lights and cleaned them with a piece of waste; that at the time of the accident he was engaged in his duties, and while alighting from an engine he stepped on the adjacent track and was struck by an engine traveling in an opposite direction. The petitioner asked that she be awarded compensation for his death. The principal business done by the respondent in passenger trains coming into Jersey City at the terminals yards, was the carrying of through interstate passengers between points in New York, New Jersey and New York City. There is no substantial dispute about the facts. The defense was, that at the time of the accident, the respondent was engaged in commerce between and among several states and that the legal rights of the petitioner and the respondent are determined exclusively by the Act of Congress of the United States and not by the New Jersey Workmen's Compensation Act. The Court found in favor of the petitioner and against the respondent.

We think this is error. The case falls within the decision of the United States Supreme Court, in the case of *North Carolina R. R. Co. v. Zachary*, 232 U. S., 248. Mr. Justice Pitney speaking for the Court, said that in order to bring the case within the terms of the Federal Act (Employers' Liability Act of 1908, 35 Stat. 65 c. 149) the defendant must have been at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and the injured employee must have been employed by such carrier in such commerce. When the defendant is a common carrier engaged in interstate commerce and the employee for whose injuries the suit is brought was employed by the defendant in such commerce,

the Federal Employers' Liability Act of 1908 governs to the exclusion of that State statutes.

The judgment of the Hudson County Court of Common Pleas is reversed.

NEW JERSEY SUPREME COURT.

February Term, 1916.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, *Respondent and Plaintiff-in-certiorari,*

vs.

CHARLES J. NEWBAKER, *Petitioner and Defendant-in-certiorari.*

Argued February 15, 1916; Decided April 19, 1916.

On certiorari, etc.

Before Justices Garrison, Trenchard and Black.

For the plaintiff-in-certiorari, George M. Shipman, Collins & Corbin, Clement K. Corbin, Carl M. Herbert.

For the defendant-in-certiorari, William H. Morrow.

Per Curiam:

We think that none of the reasons are sufficient to disturb the judgment in favor of the petitioner in the court below.

Upon considering the evidence we cannot say that the trial judge erred in his determination respecting the time when and the manner in which the petitioner was injured. The evidence also justifies the finding that the petitioner was in-

jured while in the employment of the defendant below and the finding that the accident arose out of and in the course of the employment of the petitioner. The evidence likewise justifies the conclusion that the defendant company had timely notice of the injury.

The provision of P. L. 1913 (p. 302) that claims for personal injury shall be barred, unless agreed upon or sought to be adjudged thereunder within one year, does not apply to an accidental injury received before its passage, (*Birmingham vs. Lehigh &c. Co.,* 95 Atl. 242) and that is this case.

We think the court below (the Common Pleas of Warren County) had jurisdiction to entertain this proceeding brought under our Workmen's Compensation Act. *Winfield vs. Erie R. Co.,* 96 Atl. 394.

The judgment below will be affirmed, with costs.

NEW JERSEY SUPREME COURT.

Nov. Term, 1915.

MARY TALMADGE,
Petitioner-Defendant,
vs.
NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO.,
Prosecutor.

Submitted December 2, 1915; decided February 15, 1916.

Certiorari to Sussex Common Pleas.

Before Justices Parker, Minturn and Kalisch.

For the prosecutor, Collins & Corbin.

For the defendant, William V. Rosenkrans.

Per Curiam:

This is a workmen's compensation case. The findings of fact, adequately supported by evidence, show that deceased, an employee of prosecutor, was killed by an accident arising out of and in the course of his employment, viz., by being run over by one of defendant's trains. The train contained cars engaged in interstate commerce and it sufficiently appears that deceased himself was at the time so engaging. From these premises it is argued that the federal statute applied and is exclusive, and that therefore the Sussex Pleas was without jurisdiction.

This point is settled otherwise for us by the very recent decision of the Court of Errors and Appeals in *Winfield v. Erie Railroad Co.*, November Term, 1915, in which that court held that the state act would apply unless the employer pleaded and proved that the accident in question was due to the negligence of himself or of his servants. No such claim is made here. The judgment must therefore be affirmed.

[redacted]

Supreme Court of the United States

OCTOBER TERM, 1972

THE RAILROAD COMPANY

Plaintiff-Appellant

v.

AMY C. WINFIELD

Defendant-Respondent

On Appeal to the Court of Chancery, Appeals of the State of New Jersey

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BRIEF ON BEHALF OF THE RAILROAD COMPANY, PLAINTIFF-APPELLANT

GILBERT SOLOMON
GEO. S. MORGAN
Counsel for Plaintiff-Appellant

INDEX.

SUBJECT INDEX.

	Page.
Statement of the case	1
Questions involved	3
Specification of errors	4

Brief of the Argument.

I.

The conclusion of the Supreme Court of New Jersey that at the time of the accident the defendant was engaging in interstate commerce and that the decedent was employed by it in such commerce was justified by the facts proved		**7**
A.	Facts found by New Jersey Supreme Court	7
B.	Cases in support of said finding	9
C.	Cases of injuries to employes while going to work	10
D.	Cases of injuries to employes while returning from work	11
E.	Cases on this point arising under compensation acts	14
F.	Finding as to interstate commerce one of law and not of facts	17

II.

In those cases to which the Federal Employers' Liability Act is applicable it is exclusive of all proceedings under State statutes on the same subject		**20**
A.	Cases in this Court illustrating general rule of supremacy of Federal statutes	20

Page.

B. Cases in this Court stating rule of supremacy of Federal Employers' Liability Act over state laws dealing with the subject matter 23

C. Specific examples of cases in this Court and elsewhere holding the Federal Employers' Liability Act to be exclusive of state laws 27

D. The exclusive nature of the Federal statute in interstate case is not affected by the title thereof 31

E. Cases dealing with the question of the right to compensation under state laws in the absence of negligence when the carrier is engaging, and the employe is employed, in interstate commerce 37

F. .The Federal statute covers the same field as the New Jersey statute and is therefore exclusive of the latter 44

Summary of New Jersey Compensation Act 45

1. Dicta of this Court 50
2. The implications in the Federal statute .. 53
3. Message of the President and reports of committees 58
4. Conflict between the Federal statute and the New Jersey compensation statute .. 62

III.

The New Jersey statute as construed by the Court of Errors and Appeals in that state in the present cause violates the Fourteenth Amendment of the Federal Constitution in that it denies to the plaintiff-in-error the equal protection of the laws and deprives it of its property without due process of law 80

A. Denial of equal protection 81

B. Deprivation of property without due process 86

Page.

IV.

The New Jersey statute as construed by the Court of Errors and Appeals of that State in the present cause is an unconstitutional regulation of and an interference with interstate commerce 89

V.

The judgment of the Court of Errors and Appeals of the State of New Jersey should be reversed and the judgment of the Supreme Court of that State affirmed 96

APPENDIX 97

LIST OF CASES CITED.

Page.

Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314; 21, 94

American Radiator Co. v. Rogge, 86 N. J. L., 436 84

Atlantic Coast Line R.R. Co. v. Burnette, U. S. Adv. Ops. 1915; p. 76 ..... 27, 30

Atlantic Coast Line R. Co. v. Georgia, 234 U. S., 280, 58 L. Ed., 1312; 22

Armbruster v. Chicago etc. R. Co., 147 N. W. 337 (Iowa) 29

Baltimore & O. R. R. v. Reed, 223 Fed. 689 8

Baltimore & O. R. Co. v. Whitacre, 92 Atl., 1060 (Md.) 11

Barlow v. Lehigh Valley R. R., 107 N. E., 814 214 N. Y., 116 10

Bennett v. Lehigh Valley R. R. Co., 197 Fed., 578 13

Berton v. Tietjen & Lang Dry Dock Co., 219 Fed. 763; 43

Binns v. U. S. 194 U. S. 486, 48 L. Ed. 1087 59

Central R. Co. v. Colasurdo, 192 Fed., 901 .. 9

Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433 35 Sup. Ct. Rep 865 ..... 27, 30

Chesapeake etc. Tel. Co. v. Manning, 186 U. S. 238, 46 L. Ed. 1127 59

Chicago & Alton R. R. Co. v. Wagner, U. S. Adv. Ops. 1915, p. 135 54

Chicago etc. R. Co. v. Devine, U. S. Adv. Ops. 1915, p. 27 ..... 26, 31

Chicago etc. R. Co. v. Hackett, 228 U. S. 559, 57 L. Ed. 966 81

Chicago etc. R. Co. v. Hardwick Elevator Co., 226 U. S. 426, 57 L. Ed. 284 21

Page.

Chicago etc. R.R. Co. v. McGuire, 219 U. S., 549; 55 L. Ed., 328 81

Chicago etc. R. Co. v. Pearce, 175 S. W. 1160 (Ark.) 30

Chicago etc. R. Co. v. Wright, U. S. Adv. Op., 1915, p. 185 30

Cicalese v. Lehigh Valley R. R. Co., 75 N. J. L., 897 13

Corbett v. Boston & M. R. R., 107 N. E. 60, 219 Mass., 351 29

Cory v. Lake Shore etc. R. Co., 208 Fed., 847 29

Cross v. Chicago etc. R. Co., 177 S. W. 1127 (Mo.) 31

Cunningham v. Northwestern Improvement Co., 44 Mont., 180, 119 Pac., 554 88

Darr v. Baltimore etc. R. Co., 197 Fed. 665 9

De Atley v. Chesapeake & O. Ry. Co., 201 Fed. 591 55

Dewberry v. Southern Ry. Co., 175 Fed. 307 29

Douglas v. United Mineral Mining Co., 2 W. C. C., 15 14

Dubelbeiss v. West Hoboken, 82 N. J. L. 683 19

El Paso etc. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. Ed. 106 .....30, 33

Employers' Liability Cases, 207 U. S., 463, 52 L. Ed. 297 .....32, 37

Erie R.R. Co. v. Board of Public Utility Commrs., 85 N. J. L., 420 19

Erie R. R. Co. v. New York, 233 U. S. 671, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266 22

Feaster v. Phila. etc. R. Co., 197 Fed. 580 .. 14

Fithian v. St. Louis etc. R. Co., 188 Fed., 842 29

Flanders v. Georgia etc. Ry. Co., 67 So. 68 (Fla.) 29

Fulgham v. Midland Valley R. R., 167 Fed. 660 28

Page.

Gane v. Norton Hill Colliery Co., 100 L. T. 979, 2 B. W. C. C. 42 15
Gee v. Lehigh Valley R. R., 148 N. Y. Supp. 882, 163 App. Div., 274 30
Graber v. Duluth etc. R. Co., 150 N. W. 489 (Wis.) 12
Grybowski v. Erie R.R. Co., 95 Atl., 764 (N. J. Sup. Ct.) 31, 39
Gulf etc. Ry. Co. v. Hefley, 158 U. S. 98, 39 L. Ed. 910 20
Gulf etc. Ry. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. 785 28
Gulf etc. R. R. v. State of Texas, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849 9
Hall v. De Cuir, 95 U. S., 485 92
Hammill v. Penn. R.R. Co., 94 Atl., 313 42
Hampton v. St. Louis etc. R. Co., 227 U. S. 456, 57 L. Ed. 596 22
Hawkins v. St. Louis etc. R. Co. 174 S. W. 129 (Mo.) 31
Holt v. Akarman, 84 N. J. L., 371 36
Holy Trinity Church v. U. S., 143 U. S. 457, 36 L. Ed. 226 59
Hopkins v. Port Reading R. R., 38 N. J. Law Journal, 19 (Also see Appendix) 38
Horton v. Oregon etc. R. Co., 72 Wash., 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8 .... 9, 11
Howard v. Nashville etc. Ry. Co., 179 S. W. 380 (Tenn.) 29
Hulley v. Moosbrugger, 95 Atl. 1007 18
Iannone v. New York etc. R. Co., 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730 13
Illinois Central R. R. v. Behrens, 233 U. S. 473, 58 L. Ed. 1051, 217 Fed. 967 .... 9, 83
Ives v. Southern Buffalo Ry. Co., 94 N. E. 431; 201 N. Y., 271 ..... 73, 86, 88

Page.

Jarvis v. Daggett, 151 Pac., 648 (Wash.) 44, 85
Jensen v. Southern P. Co., 109 N. E. 600, 215 N. Y. 514 42
Kamboris v. Oregon etc. R. Co., 146 Pac. 1097 (Ore.) 29
Kennerson v. Thames Tow Boat Co., 94 Atl. 372 (Conn.) 42
Kepner v. U. S., 195 U. S. 100, 49 L. Ed. 114 58
Kern v. Chicago etc. Ry. Co., 201 Fed. 404 .. 12
Keyport Steamboat Co. v. Farmers' Transportation Co., 18 N. J. Eq. 1 35
Kindellen v. Mt. Wash. R. Co., 76 N. H. 54, 79 Atl. 691 13
Knowles v. New York etc. R. Co., 150 N. Y. Supp. 599, 164 App. Div., 711 11
LaCasse v. N. O. T. & U. R. Co., 64 So. 1012 (La.) 29
Lamphere v. Oregon etc. R. Co., 196 Fed. 336 (reversing 193 Fed. 248) 10, 14
Lauer v. No. Pac. Ry. Co., 145 Pac. 606 (Wash.) 31
Lehigh Coal Co. v. Junction, 68 Atl. 806 ... 19
Lincks v. Erie R. R., 38 N. J. Law Journal, 81 (Also see appendix) 38
Louisville & N. R. Co. v. Melton, 218 U. S. 35, 54 L. Ed. 921 81
Louisville & N. R. Co. v. Walker, 162 Ky. 209, 172 S. W. 517 12
McGarvey's Guardian v. McGarvey's Admr., 173 S. W. 765, 163 Ky. 242 29
McGovern v. Phila. & R. R. Co., 235 U. S. 389, 59 L. Ed. 283 .....30, 52
McKee and others v. Great Northern Ry. Co., 42 Ir. L. T., 132; 1 B. W. C. C., 165 16
Mason v. Great Nor. Ry. Co., 155 N. W., 32 (N. D.) 13

Page.

Michigan Central R. R. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417 .....24, 28, 52
Middleton v. Texas, etc., Co., 178 S. W., 956 (Tex.) 73
Miller v. Kansas City etc. Ry. Co., 168 S. W. 336, 180 Mo. App. 371 31
Minnesota Rate Cases, 230 U. S. 352, 57 L. Ed. 1511 91
Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, 32 L. Ed. 107 81
Missouri etc. R. Co. v. Rentz, 162 S. W. 959 (Tex.) 10
Missouri etc. R. Co. v. U. S., 231 U. S. 112, 58 L. Ed. 144 10
Missouri, etc., R. Co. v. Wulf, 226 U. S., 570; 57 L. Ed., 355 ..... 24, 28
Mobile etc. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. Ed. 78 81
Montgomery v. Southern Pac. Co., 64 Ore. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13 9
Neil v. Idaho etc. R. Co., 22 Idaho 74, 125 Pac. 331 10
Newbaker v. New York etc. R. R., 38 N. J. Law Journal, 175 37
New York Cent. R. R. v. Carr, 238 U. S. 260, 59 L. Ed. 1298 9
North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591 .....7, 10, 25
Northern Pac. R. Co. v. Maerkl, 198 Fed. 1 9
Northern Pac. R. Co. v. Meese, Opn. of U. S. Sup. Ct. Jan. 17, 1916 79
Northern Pac. R. Co. v. Washington, 222 U. S. 370, 56 L. Ed. 237 .....21, 61
Oberlin v. Oregon etc. R. Co., 142 Pac. 554 (Ore.) 31
O'Brien v. Boston etc. R. Co., 138 Mass. 387, 52 Am. Rep. 279 13

Page.

Passaic, The, 204 Fed. 266 71

Pedersen v. D. L. & W. R. R., 229 U. S. 146, 57 L. Ed., 1125 9
197 Fed., 537 14

Peet v. Mills, 76 Wash. 437, 136 Pac. 685 ... 79

Penny v. New Orleans etc. R. Co., 66 So. 313, 135 La. 962 29

Perry v. Illinois Central R. R., 143 N. W. 724 (Minn.) 9

Phila. etc. R. Co. v. Tucker, 35 App. D. C. 123, 220 U. S. 608 11

Phila. etc. R. R. Co. v. Schubert, 224 U. S. 603, 56 L. Ed. 911 .....51, 54, 77

Pittsburg etc. R. Co. v. Glinn, 219 Fed. 148 9

Pomfret v. Lancashire & Yorkshire Ry. Co., 19 T. L. R., 649; 5 B. W. C. C., 22 15

Pub. Service Gas Co. v. Board of Pub. Util. Commrs., 84 N. J. L. 463; reversed 92 Atl. 606; affirmed on rehearing on opinion of Supreme Court, 95 Atl. 1079; see also 95 Atl., 127 19

Rounsaville v. Central R. Co., 37 N. J. Law Journal, 295 ..... 38, 56, 61, 75
94 Atl., 392 ..... 38, 42, 69, 89

St. Bernard Cypress Co. v. Johnson, 222 Fed. 246 13

St. Louis etc. R. Co. v. Brothers, 165 S. W. 488 (Tex.) 12

St. Louis etc. Ry. Co. v. Craft, 237 U. S. 648, 59 L. Ed. 1160 .....26, 28, 59, 65

St. Louis etc. Ry. Co. v. Edwards, 227 U. S. 265, 57 L. Ed. 506 21

St. Louis etc. Ry. Co. v. Hesterly, 228 U. S. 702, 57 L. Ed. 1031 .....25, 28, 65

St. Louis etc. R. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129 .....9, 25, 29

San Pedro etc. R. Co. v. Davide, 210 Fed. 870 13

Page.

Savage v. Jones, 225 U. S. 501, 56 L. Ed. 1182 ..... 23, 54, 61
Schuede v. Zenith S. S. Co., 216 Fed. 566 31, 44, 93
Seaboard Air Line Ry. v. Horton, 233 U. S., 492; 58 L. Ed., 1062 . 25, 31, 52, 53, 55, 63
U. S. Adv. Op., 1915, p. 180 31
Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327 .....24, 50
Sexton v. Newark District Telegraph Co., 86 Atl. 451, 84 N. J. L. 85; affirmed 91 Atl. 1070, 86 N. J. L. 701 .....49, 75, 86, 87
Shannon v. Boston & M. R. R., 92 Atl. 167, 77 N. H. 349 30
Smith v. Industrial Accident Comm., 147 Pac. 600 40
South Covington Ry. v. Covington, 235 U. S. 537, 59 L. Ed. 350 92
Southern Pac. Co. v. Crenshaw, 5 Ga. App. 675, 63 S. E. 865 95
Southern Ry. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564 .....54, 72
Southern Ry. Co. v. R. R. Comm. of Indiana, 236 U. S. 439, 59 L. Ed. 661 22
Southern Ry. Co. v. Reid, 222 U. S. 424, 56 L. Ed. 257 .....21, 61
Staley v. Ill. Cent. R. R. Co., 109 N. E. 342 (Ill.) 37, 41, 86, 92
State Journal Co. v. Workmen's Compensation Board, 170 S. W. 1166 (Ky.) 73
Taylor v. Taylor, 232 U. S. 363, 58 L. Ed. 638 ..... 29, 65
Taylor v. Seabrook, 94 Atl. 399 N. J.) 63
Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553 61
Texas & Pac. R. Co. v. White, 177 S. W. 1185 (Tex.) 11, 31

Page.

Thompson T. & W. Assn. v. McGregor, 207 Fed, 209, 124 C. C. A., 479 93

Toledo etc. R. Co. v. Slavin, 236 U. S. 454, 59 L. Ed. 671 .....3, 30, 31, 72

Troxell v. Delaware etc. R. R. Co., 227 U. S. 434, 57 L. Ed. 586 28

Vick v. N. Y. Cent. etc. R. Co., 95 N. Y. 267, 47 Am. Rep. 36 13

Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. Ed. 1226 25

Walker v. Clyde Steamship Co., 109 N. E. 604; 215 N. Y., 529 ..... 43, 44

Walsh v. New York etc. R. R., 173 Fed. 494 28

Warden, L. P. & Son v. Cole, 86 Pac., 464 .. 9

West Jersey Trust Co. Admr. v. Phila. & Reading R. R., 37 N. J. Law Journal 108, ... 38

95 Atl., 753 ..... 38, 78, 85

Whitecraft v. Penn. R. R. Co., 36 N. J. Law Journal 182 37

Willever v. D. L. & W. R. R., 94 Atl. 595 (N. J. Sup. Ct.) 10

Winfield v. N. Y. Cent. R. R., 153 N. Y. Supp. 499, 168 App. Div. 351, ...32, 40

110 N. E. 614, 216 N. Y. 284 .....39, 56, 91

Winfree v. Northern P. R. Co., 227 U. S. 296, 57 L. Ed. 518 29

Yazoo etc. R. R. v. Wright, 235 U. S. 376, 59 L. Ed. 277 72

Yellow Pine Co. v. Board of Assessors, 70 N. J. L. 590, 72 N. J. L. 182 19

Other Authorities.

	Page.
Boyd's Workmen's Compensation, p. 1063, § 486	16
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N. J. Laws of 1911, p. 134	1-6; 45
N. J. Laws of 1913, p. 586	64
N. J. Laws of 1914, p. 69	64
N. J. Comp. Stat. 1910, Vol. 2, p. 1907	64
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U. S. Doc. 5241, p. 1	59
U. S. Doc. 5219, p. 2	60
U. S. Doc. 5226, pp. 1, 3	59

No. 811.

Supreme Court of the United States

OCTOBER TERM, 1915.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
vs.
AMY L. WINFIELD,
Defendant-in-Error.

In error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF ON BEHALF OF ERIE RAILROAD COMPANY, PLAINTIFF-IN-ERROR.

1.

Statement of the Case.

The defendant-in-error (hereinafter referred to as the plaintiff) as the widow of one David R. Winfield, filed a petition with one of the judges of the Court of Common Pleas in the County of Hudson and State of New Jersey to recover compensation for the death of her husband while in the employ of the plaintiff-in-error (hereinafter called the defendant) as an engineer. The petition was filed pursuant to the provisions of Chapter 95, Laws of 1911 of the State of New Jersey, providing that employers should make compensation regardless of negligence to their employes, if injured, or their dependents, if kill-

ed, in cases of accident arising out of and in the course of employment.

The defendant answered that at the time of the accident it was engaging in interstate commerce, and that the decedent was employed by it in such commerce; and that therefore the legal rights of the parties were determined exclusively by the Federal Employer's Liability Act of April 22, 1908; and that consequently the Judge of the Common Pleas had no jurisdiction.

At the hearing of the petition all the facts were admitted. There was no proof of negligence on the part of the defendant, or any of its officers, agents or employees. The Judge of the Common Pleas found for the plaintiff on the ground that the decedent at the time of the accident was not engaged in a service which was part of interstate commerce. Judgment was accordingly entered in favor of the plaintiff for a certain amount calculated according to the provisions of the New Jersey statute (p. 10 of Rec.).

Thereupon the defendant obtained from the New Jersey Supreme Court a writ of certiorari to review the said judgment. That Court held that the Federal Act applied, and that it excluded proceedings under the State Compensation Act. The judgment of the Court of Common Pleas was therefore reversed (p. 15 of Rec.).

Plaintiff then took an appeal to the New Jersey Court of Errors and Appeals. That Court held that it was not necessary to determine whether the decedent was employed in interstate commerce as held by the Supreme Court or in intrastate commerce as held by the Common Pleas, but that for the purpose of the appeal it would assume that the conclusion of the Supreme

Court as to the character of his employment was justified by the facts proved. The Court of Errors and Appeals then concluded that in the absence of proof of negligence whereby liability against the carrier was "created" under the Federal statute the decedent's representative was entitled to recover compensation under the State Law. The judgment of the New Jersey Supreme Court was therefore reversed and the judgment of the Common Pleas was affirmed (pp. 17-19 of Rec.). The defendant thereupon sued out a writ of error to this Court. (*Toledo etc. R. Co. v. Slavin*, 236 U. S., 454; 59 L. Ed., 671.)

Questions Involved.

The questions involved are whether the said Federal statute of April 22, 1908, is exclusive of all State legislation on the subject matter of liability of a carrier employer by railroad to make ~~liens~~ when at the time of the accident said carrier is engaging in interstate commerce and the employe is employed by it, at such time in such commerce— or whether under such circumstances said carrier is bound to make compensation pursuant to the provisions of the State law when it appears that the accident happened without negligence on the part of said carrier or any of its officers, agents or employes; also, whether said Chapter 95 of the Laws of 1911 of the State of New Jersey, as construed by the Court of Errors and Appeals in this cause, violates the Federal Constitution in that by such construction it operates as a regulation of, a burden upon, and an interference with interstate commerce; also whether said State statute, as thus construed, is in conflict with said Federal Act of April 22, 1908, in that

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the purpose and intent of the contract implied in the said State statute are to enable such common carriers to exempt themselves from the liability created by said Federal statute; also whether said State statute, as thus construed, violates the Fourteenth Amendment of the Federal Constitution.

2.

Specification of Errors.

(1) By the judgment of said Court of Errors and Appeals the judgment of the Supreme Court of New Jersey was reversed, whereby the jurisdiction of the Hudson County Court of Common Pleas and Judge of said Court, under an Act of the Legislature of the State of New Jersey, entitled "an Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder", approved April 4th, 1911 (being Chapter 95, P. L., 1911) and the amendments thereof and supplements thereto, was sustained, notwithstanding the fact that at the time of the accident to plaintiff's decedent, for whose death this action was brought, the defendant, Erie Railroad Company, was engaging in commerce between the several states or territories and between the states and territories, and between the District of Columbia and the states or territories, and between the District of Columbia and the states and territories and foreign nations, and the said decedent was employed by it as such carrier in such commerce and therefore the legal rights of the plaintiff

and defendant are determined by the Act of Congress of the United States, entitled "An Act relating to the liablity of common carriers by railroad to their employes in certain cases", approved April 22nd, 1908, and the amendments thereof and supplements thereto, whereas by the law of the land the said judgment ought to have been affirmed and the Hudson County Court of Common Pleas and the Judge of said Court held to be without jurisdiction in the premises for the reason that under the provisions of the Constitution of the United States that the Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and that such Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, said statute passed by the Congress of the United States is exclusive of the remedies provided by said statute of the Legislature of the State of New Jersey, and the said Hudson County Court of Common Pleas and the Judge of said Court were therefore without jurisdiction in the premises.

2. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals, violates the Constitution of the United States because by such construction the said statute operates as a regulation of, a burden upon and an interference with interstate commerce, contrary to Article I, Section VIII, paragraph 3 of said Constitution.

3. The said statute of the State of New Jer-

sey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals, is in violation of and in conflict with the said Act of the Congress of the United States of April 22nd, 1908, in that the purpose and intent of the contract implied in said New Jersey Act, in Section 2 thereof, are to enable common carriers to exempt themselves from the liability created by said Act of Congress.

4. The said statute of the State of New Jersey (being Chapter 95 of the Laws of 1911) as construed by said New Jersey Court of Errors and Appeals violates the Constitution of the United States in that it abridges the privileges and immunities of the defendant and deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the laws, contrary to the Fourteenth Amendment of said Constitution of the United States.

3.

BRIEF OF THE ARGUMENT.

I.

The conclusions of the Supreme Court of New Jersey that at the time of the accident the defendant was engaging in interstate commerce and that the decedent was employed by it in such commerce was justified by the facts proved.

A. Facts found by New Jersey Supreme Court.

In the opinion of the New Jersey Supreme Court that Court stated the facts as follows:

> "The record shows that David R. Winfield since 1880, had been employed as an engineer by the Erie Railroad Company; that he was a switch engineer in the Bergen Yards at Croxton, New Jersey; that on the twenty-third day of October, 1914, about six forty-five in the evening, he was run over by an engine of the said respondent (defendant) and instantly killed. His duties never took him outside of the State of New Jersey. They consisted in drilling or moving with his engine freight cars containing both interstate and intrastate commerce. On the day he was killed, he had finished his work and had taken his engine to the ash-pit. He started to go home, across the tracks of the respondent (defendant) when he was struck by a locomotive and killed" (p. 15 of the Record).

That Court then decided, on the authority of *North Carolina R.R. Co. v. Zachary*, 232 U. S.,

248; 58 L. Ed., 591, that the Federal statute was applicable under such circumstances.

We submit that this conclusion was justified by the facts proved. The stipulation at the hearing before the Judge of Common Pleas shows that the engine which the decedent had been operating during the day when he was killed was a drill engine and was used to transfer cars from the yard to what is known as the "transfer station"; that after working all day he had placed his engine on the ash-pit and then left it and started to walk home across the tracks of the defendant. He was struck by another engine just after he had left his own engine (pp. 12, 13). The "transfer station", where the crew of which the decedent was a member worked, is used for cars carrying less than carload lots. It was the duty of this crew to move these cars around the yard and to sort them out so that they might be conveniently taken to points on the line of the defendant or to New York City. The last thing done by the crew on the day of the accident was the sorting of these cars (p. 13). The stipulation does not show specifically that the defendant's railroad extended outside of the limits of the State of New Jersey, although the trial judge stated that the decedent was engaged in both interstate and intrastate commerce (p. 13). However, it does affirmatively appear that at least some of the cars which were drilled and sorted by the decedent's crew were taken to New York City (p. 13). Moreover, the Court will take judicial notice of the location and extent of important lines of railroad.

Baltimore & Ohio R.R. Co. v. Reed, 223 Fed., 689;

Gulf, etc., R.R. v. State of Texas, 72 Tex., 404; 10 S. W., 81; 1 L. R. A., 849;

L. P. Warden & Son v. Cole, 86 Pac., 464.

B. Cases in support of said findings.

If the accident had occurred while the decedent was drilling cars, containing both interstate and intrastate shipments, no question could be raised as to the application of the Federal statute.

Pedersen v. D. L. & W. R.R., 229 U. S., 146; 57 L. Ed., 1125;

St. Louis, etc., R. Co. v. Seale, 229 U. S., 156; 57 L. Ed., 1129;

Illinois Central R.R. v. Behrens, 233 U. S., 473; 58 L. Ed., 1051; (see also 217 Fed., 967);

New York Central R.R. v. Carr, 238 U. S., 260; 59 L. Ed., 1298;

Central R. Co. v. Colasurdo, 192 Fed., 901;

Darr v. Baltimore etc. R. Co., 197 Fed., 665;

Northern Pacific R. Co. v. Maerkl, 198 Fed., 1;

Pittsburgh, etc., R. Co., v. Glinn, 219 Fed., 148;

Perry v. Illinois Central R.R., 143 N. W., 724 (Minn.);

Horton v. Oregon, etc., R. Co., 72 Wash., 503; 130 Pac., 897; 47 L. R. A. (N. S.), 8;

Montgomery v. Southern Pac. Co., 64 Ore., 597; 131 Pac., 507; 47 L. R. A., (N. S.), 13;

Willever v. D., L. & W. R.R., 94 Atl., 595 (N. J. Sup. Ct);
Barlow v. Lehigh Valley R.R., 107 N. E., 814; 214 N. Y., 116.

The accident in the present case happened just after the decedent had left his engine and was starting to walk home across the tracks in the railroad yard. If suit had been brought under the Federal statute on the theory that the accident was due to some negligence on the part of the defendant or its officers, agents or employes, we submit that under the authorities the Federal statute would have been held applicable on the ground that the accident happened while the decedent was still "on duty".

Missouri, etc., R. Co. v. U. S., 231 U. S., 112; 58 L. Ed., 144;
North Carolina R. Co., v. Zachary, 232 U. S., 248; 58 L. Ed., 591;
Neil v. Idaho, etc., R. Co., 22 Idaho, 74; 125 Pac., 331.

C. Cases of injuries to employes while going to work.

Several cases have arisen under the Federal Act wherein the employe was injured while on his way *to* work. Thus in *Lamphere v. Oregon, etc., R. Co.*, 196 Fed., 336 (reversing 193 Fed., 248) the Federal statute was applied to the case of a fireman who was ordered to report at a station to be transported with others to another station to relieve the crew of an interstate train; and who was killed by the negligence of another crew while he was approaching the station.

In *Missouri, etc., R. Co. v. Rentz*, 162 S. W.,

959 (Texas), it was held that an engineer who was injured while on his way from his home to take his engine out of the round-house to engage in interstate commerce was within the act.

In *Knowles v. New York, etc., R. Co.*, 150 N. Y. Supp., 599; 164 App. Div., 711, an employe who was killed while riding to work on a switch engine was held within the statute.

In *Philadelphia, etc., R. Co. v. Tucker*, 35 App. D. C., 123, (affirmed, 220 U. S., 608), an engineer who was killed on the premises of the railroad while on his way to work was held within the protection of the Federal Act.

In *Horton v. Oregon, etc., R. Co.*, 72 Wash., 503; 130 Pac., 897, a pumper employed at a pumping station for locomotives was held to come under the Federal statute when he was injured while riding from his home to his work at the station on a small hand-car furnished by the company for that purpose.

In *Baltimore & O. R. Co. v. Whitacre*, 92 Atl., 1060 (Md.), the Federal statute was applied to the case of an employe who had reported at the railroad yard about an hour before the leaving time of his train; while he was on his way to his engine through the company's premises he was asked by the fireman to look up the "tool-boy" and get a cup, and while he was doing this he fell into a cinder pit.

D. Cases of injuries to employes while returning from work.

The same rule, we submit, applies to a case of an employe who was injured while on his way home *from* work. Thus, in the case of *Texas & Pacific R. Co. v. White*, 177 S. W., 1185 (Texas),

the Federal statute was held to apply to the case of a section foreman who was run down while helping his crew lift their hand-car from the track while they were on their way home from work after having made certain repairs to the track of an interstate railroad. The Court said:

> "It appears that at the time of the accident in question in the present suit White and his crew were still in the employment of the defendant company. The return trip to Loraine, his headquarters, was as much an incident to and a part of the work of repairing the broken rail as was the outgoing trip to perform that service."

In *St. Louis, etc., R. Co., v. Brothers*, 165 S. W., 488 (Texas), an employe who was riding on a pass on his way home from work was held to come under the Federal statute.

In *Louisville & N. R. Co. v. Walker*, 162 Ky., 209; 172 S. W., 517, employes who were riding home from work on a push-car were held to be under the Federal statute.

In *Graber v. Duluth, etc., R. Co.*, 150 N. W., 489 (Wis.), a brakeman had finished his regular duties after a run between two state points on a train which had some interstate cars. He had then gone to a saloon and from there started to cross over a train to go to the station in order to see if the conductor had any further orders for him. He was injured while crossing the track. Held, that he was employed in interstate commerce.

In *Kern v. Chicago, etc., Ry. Co.*, 201 Fed., 404, the plaintiff was injured while returning at night from his work to a construction camp on a hand-car furnished by the railroad for that

purpose. The case was treated as arising under the Federal statute. See also *Manson v. Great Northern Ry. Co.*, 155 N. W., 32 (N. D.).

In *San Pedro, etc., R. Co. v. Davide*, 210 Fed., 870 (Cir. Ct. of App., 9th Circuit), it was held that a railroad section hand who had been engaged in interstate commerce during the day was still so engaged while riding home on a hand-car furnished by the company at the conclusion of his day's labor.

The case of *Cicalese v. Lehigh Valley R.R. Co.*, 75 N. J. L., 897, did not arise under the Federal statute, but the principle is applicable; it was held that where the carrier provided hand-cars to transport its employes from the place of work to their homes, even if the journey is commenced after the usual work of the day has ceased, the relation of master and servant continues until the employe has reached his destination. To the same effect see:

St. Bernard Cypress Co. v. Johnson, 222 Fed., 246;

Kindellen v. Mt. Wash. R. Co., 76 N. H., 54; 79 Atl., 691;

Iannone v. New York, etc., R. Co., 21 R. I., 452; 44 Atl., 592; 46 L. R. A., 730;

Vick v. N. Y. Cent., etc., R. Co., 95 N. Y., 267; 47 Am. Rep., 36;

O'Brien v. Boston, etc., R. Co., 138 Mass., 387 ; 52 Am. Rep., 279;

4 Labatt's Master and Servant, 4684 (2nd. Ed.), and cases cited.

Counsel for plaintiff may cite the cases of *Bennett v. Lehigh Valley R. Co.*, 197 Fed., 578,

and *Feaster v. Philadelphia, etc., R. Co.*, 197 Fed., 580, where the District Judge held that employes were not engaged in interstate commerce while going to or from their work on a train by permission of the company. The decision in each case, however, was based on the authority of the *Pederson* case in 197 Fed., 537, which was afterwards reversed by this Court, and also of the *Lamphere case*, 193 Fed., 248, which was afterwards reversed by the Circuit Court of Appeals for the Ninth Circuit. (See 196 Fed., 336).

E. Cases under compensation acts.

In the respect now under consideration, the present case is analogous to cases arising under compensation acts wherein it is held that an injured employe is entitled to receive compensation if injured on the employer's premises while on his way home from work, even though the actual work of the day has been finished before the accident.

The following are illustrative cases arising under the English Workmen's Compensation Act, in which there was a provision similar to that found in practically all of the state statutes, namely, that compensation is to be made for injuries "by accident arising out of and in the course of employment", and in each of them the injured employe was held to be entitled to receive compensation.

In *Douglas v. United Mineral Mining Co.*, 2 W. C. C., 15, a miner, having finished his day's work started to leave the mine by means of a cage in the sump shaft. When the cage was near the top of the shaft the employe who was operating

the engine pulled the wrong lever and the cage fell down and the miner was killed. His representative was held entitled to compensation although another method of leaving the mine had been provided.

In *Pomfret v. Lancastershire & Yorkshire Ry. Co.*, 19 T. L. R., 649; 5 B. W. C. C., 22, a railroad employe booked off every evening at Newton Heath Station, and he had the right when he had finished his day's work to travel by any train going to Newton Heath from the place where he left his engine. While travelling by such a train from Charleston Station he fell from the railroad coach in which he was riding and was killed—no explanation being given as to how he happened to fall. Held, the accident arose out of and in the course of the employment.

In *Gane v. Norton Hill Colliery Co.*, 100 L. T., 979; 2 Butterworth W. C. C., 42, an employe after finishing his work at a colliery started to go home across some railroad tracks which were on the premises and under the control of the employer; and while so doing was injured by the movement of certain trucks on the railroad. He was held entitled to receive compensation.

Cozens-Hardy, M. R., said:

> "What was the duty of the applicant? What was really the implied term of his employment? That he should when his day's work was over, without loitering and with all reasonable speed, leave the colliery premises by the accustomed and permitted route. That is what he did. It was in the course of that departure that the accident happened. I feel myself bound to say that in point of law this accident which happened in the

> immediate neighborhood of the pit's mouth, close to the screen on the colliery premises, was an accident which happened 'in the course of' applicant's employment—the course of his employment plainly not being at one end to the moment when he reaches the place where he is to do his work, or at the other end to the moment when he comes up from the pit's mouth. It must include a reasonable interval of time and of space during which the employment lasts."

In *McKee and others v. Great Northern Railway Co.*, 42 Ir. L. T., 132; 1 Butterworth W. C. C., 165, a railroad employe took a short cut home and was killed by a train while on the premises of the employer. Held, the accident arose out of and in the course of the employment.

FitzGibbon, L. J., said:

> "I think a man's employment does not cease until he leaves his employer's premises * * * The injury which occurred in this case is a risk inherent and incidental to any employment in which a person is obliged to walk through premises where shunting takes place. * * * I have no doubt that the evidence supports the finding that the man was going home by a short cut, and the injury arose out of his employment."

These and other cases will be found collated in the following text books:

> Boyd's Workmen's Compensation, p. 1063, §486;
>
> Bradbury's Workmen's Compensation, pp. 404-412 (2nd. Ed.);
>
> Ruegg's Employer's Liability, p. 377 (8th Ed.);
>
> 5 Labatt's Master & Servant, p. 5426 (2nd. Ed.).

F. Findings as to interstate commerce one of law and not of fact.

It may be urged that the finding of the Judge of the Common Pleas that the decedent was not engaged in interstate "service" at the time of the accident is conclusive by virtue of the provisions of Section 18 of the New Jersey Compensation Act, which reads as follows:

> "In case of a dispute over, or failure to agree upon, a claim for compensation between employer and employe, or the dependents of the employe, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding."

The findings of the Common Pleas are expressed in the form of a "determination" (pp. 9 and 10 of the Record). An examination thereof will show that the facts as to the nature of the employment of the decedent are given in paragraphs three and four of the Determination (pp. 9, 10). But whether the decedent at the time of the accident was engaged in interstate commerce is, we submit, a conclusion of law to be drawn from the facts. The facts being undisputed, the Judge of the Common Pleas could not find *as a matter of fact* that the decedent

was not engaged in interstate commerce. The facts found by him could extend only to the actual physical acts performed by the decedent; whether by reason of such acts he was employed in interstate commerce is a conclusion of law.

The Supreme Court on the same undisputed facts came to a different conclusion of law. The Supreme Court had both the right and the duty to determine from the facts what was the legal conclusion to be derived therefrom. The New Jersey Court of Errors and Appeals has recently had occasion to consider Section 18 of the Compensation Act in the case of *Hulley v. Moosbrugger*, 95 Atl., 1007. This case held that although the findings of the Common Pleas as to the facts are conclusive on appeal, nevertheless "the law arising upon the ascertained facts is a question for the court reviewing the decision". It therefore follows that the findings of the Common Pleas Judge are not "conclusive and binding" if the judge of that court has made a mistake of law upon the "ascertained" facts.

In the present case there was no dispute as to the facts. Hence, the finding of the Judge of Common Pleas that the decedent was not employed in interstate service at the time of the accident is not conclusive but was a proper subject matter of review by the New Jersey Supreme Court. The latter court found that the decedent was engaged in interstate commerce. If this finding of the Supreme Court is to be considered as a finding of law it is, of course, a subject for review by the New Jersey Court of Errors and Appeals or by this Court. On the other hand, if the finding of the Supreme Court

on this point be considered as a finding of fact then under the New Jersey practice such finding of fact is conclusive, for the reason that (as repeatedly held in New Jersey) the conclusions of the Supreme Court, on certiorari to review the decision of statutory tribunals (as in this case, a Judge of the Court of Common Pleas) are final if there be any evidence to sustain them.

Lehigh Coal Co. v. Junction, 68 Atl., 806;

Yellow Pine Co. v. Board of Assessors, 70 N. J. L., 590; 72 N. J. L., 182;

Dubelbeiss v. West Hoboken, 82 N. J. L., 683;

Erie R.R. Co. v. Board of Public Utility Commrs., 85 N. J. L., 420;

Public Service Gas Co. v. Board of Public Utility Commrs., 84 N. J. L., 463; reversed 92 Atl., 606; affirmed on rehearing on opinion of Supreme Court 95 Atl., 1079; see also 95 Atl., 127.

We submit that, on the undisputed facts, the conclusion of the New Jersey Supreme Court that as a matter of law the defendant at the time of the accident was engaging in interstate commerce, and the decedent was employed by it in such commerce, is justified. The question still remains whether, when there is no proof of negligence, the dependents of the decedent are entitled to receive compensation under the state law, or must be remitted to whatever remedy may exist under the Federal Act.

II.

In those cases to which the Federal Employers' Liability Act is applicable it is exclusive of all proceedings under state statutes on the same subject.

In those matters in which the Congress of the United States and the Legislatures of the states have concurrent jurisdiction, it is elementary that the state may legislate until such time as the Federal Congress acts upon the subject. When the latter event occurs all state legislation must yield.

With respect to the particular question of interstate commerce, it is also settled that the power of Congress to regulate the same is such that when exercised it is exclusive and supersedes state legislation on that subject.

These general statements are subject to the modification that Congress may so limit its regulation in regard to the particular subject matter as to occupy only a limited field and leave part of the subject open to other legislation on the part of the state.

A. Cases in this Court illustrating general rule of supremacy of Federal statutes.

As illustrative of cases wherein Congress was held to have exercised its power in such a manner as to cover the entire field and thereby to exclude *all* legislation by the state on the same subject, we call attention to the following:

In *Gulf, etc., Ry. Co. v. Hefley*, 158 U. S. 98; 39 L. Ed., 910, it was held that a statute of Texas imposing a penalty for failure to deliver

goods on tender of the rate named in the bill of lading did not apply to interstate shipments, for the reason that Congress had legislated upon the same "subject matter" in the Interstate Commerce Act, whereby the published tariff rate was prescribed as the rule of compensation in such cases.

In *Northern Pacific Ry. Co. v. Washington*, 222 U. S., 370; 56 L. Ed., 237, it was held that legislation by Congress as to hours of service of railroad employees occupied the field to such an extent as to prevent state legislation on that subject.

In *Southern Ry. Co. v. Reid*, 222 U. S., 424; 56 L. Ed., 257, a statute of North Carolina requiring common carriers to transport freight as soon as received to interstate points under certain penalty for failing to do so, was held to be invalid because in conflict with the requirement of the Hepburn Act forbidding such transportation until rates had been fixed and published.

In *Chicago, etc., R. Co. v. Hardwick Elevator Co.*, 226 U. S., 426; 57 L. Ed., 284, a reciprocal demurrage law of Minnesota was held invalid because Congress, by the passage of the Hepburn Act had "exerted its paramount and all-embracing authority over the subject."

In *Adams Express Co. v. Croninger*, 226 U. S., 491; 57 L. Ed., 314, it was held that the Carmack amendment to the Hepburn Act superseded all state laws upon the subject of the limitation of the carrier's liability for loss of and damage to interstate shipments.

In the cases of *St. Louis, etc., Ry. Co. v. Edwards*, 227 U. S., 265; 57 L. Ed., 506, and

Hampton v. St. Louis, etc., R. Co., 227 U. S., 456; 57 L. Ed., 596, a statute of Arkansas, imposing a penalty for delay in delivering cars to to the consignee, was held invalid on the ground that it had been superseded by the provisions of the Hepburn Act.

In *Erie R.R. Co. v. New York,* 233 U. S., 671; 58 L. Ed., 1149; 52 L. R. A. (N. S.), 266, the provisions in the labor law of the State of New York relating to the hours of service of telegraph operators engaged in interstate commerce were held to be void as Congress had covered the same "field" by the Hours of Service Act of 1907.

In *Southern Ry. Co. v. R.R. Commissioners of Indiana,* 236 U. S., 439; 59 L. Ed., 661, held that the state law of Indiana was superseded by the Federal Safety Appliance Act, although the requirements of the latter differed in certain details from those of the state law.

An illustration of a case where the State Law was sustained is *Atlantic Coast Line R. Co. vs. Georgia,* 234 U. S. 280, 58 L. Ed. 1312, where this court upheld the State Law requiring locomotives engaged in interstate commerce to be equipped with electric headlights of a certain candle-power —the decision being on the ground that Congress had not as yet established any regulations as to that subject.

In determining the question of whether or not the legislation of Congress has covered the entire field of any particular subject, it is not necessary that the statute shall expressly declare its intention to occupy the whole field; neither is it necessary for Congress to expressly prohibit any State action on the same subject.

In the case of *Savage v. Jones*, 225 U. S. 501 at p. 533, 56 L. Ed. 1182 the court said (italics ours):

> "When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that *which needs must be implied is of no less force than that which is expressed.* If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power (citing cases).
>
> "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state" (citing cases).

B. Cases in this Court stating rule of supremacy of Federal Employers' Liability Act over State Laws dealing with the same subject matter.

See also Dermott v Wisconsi 228 U.S. at page

The foregoing principles have been held applicable to congressional legislation on the subject of the liability of common carriers to their employees, and it has been repeatedly stated in cases brought under the Federal Employers' Liability Act that that Act supersedes state legislation on the same subject matter. Thus in *Second Employers Liability Cases*, 223 U. S. 1. 56 L. Ed. 327, the court said:

> "Prior to the present act, the laws of the

several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress (citing cases). The inaction of Congress, however, in no wise affected its power over the subject (citing cases). And now that Congress has acted, the laws of the states in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is" (citing cases) (p. 54).

In *Missouri etc. R. Co. v. Wulf*, 226 U. S., 570, 57 L. Ed. 355, the Court said:

> "It is true the original petition asserted a right of action under the laws of Kansas without making reference to the act of Congress, but the court was presumed to be cognizant of the enactment of the Employers Liability Act and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject" (p. 575).

In *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed., 417, the Court said:

> "By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employes injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. * * * It therefore follows that in respect of state legislation prescribing the liability of such carriers

for injuries to their employes while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states" (p. 66).

In *St. Louis &c. Ry. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031, the Court said:

> "Coming to the merits it now is decided that the act of Congress supersedes state laws in the matter with which it deals."

In *St. Louis etc. R. Co. v. Seale*, 229 U. S., 156, 57 L. Ed. 1129, the Court said:

> "If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the national constitution."

In *North Carolina R. Co. v. Zachary*, 232 U. S., 248, 58 L. Ed. 591, the Court said:

> "In order to bring the case within the terms of the Federal statute, defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appear the Federal act governs, to the exclusion of the statutes of the state" (p. 256).

In *Seaboard Air Line v. Horton*, 233 U. S., 492, 58 L. Ed. 1062, the Court said:

> "It is settled that since Congress by the act of 1908, took possession of the field of the employers liability to employees in interstate transportation by rail, all state laws upon the subject are superseded" (p. 501).

In *Wabash R. Co. v. Hayes*, 234 U. S., 86; 58 L. Ed. 1226, the Court said:

> "Had the injuries occurred in interstate

> commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the state; in other words, the Federal Act would have been exclusive in its operation, not merely cumulative."

In *St. Louis etc. R. Co. v. Craft*, 237 U. S., 648; 59 L. Ed. 1160, the Court said:

> "By the common law, the death of the human being although wrongfully caused, affords no basis for a recovery of damages, and a right of action for personal injuries dies with the person injured" (citing cases).
>
> "Therefore, in cases like this, the right of recovery depends entirely upon statute law. Here the state statute is not applicable because superseded, as respects the class of cases to which this one belongs, by the Federal Employers Liability Act." (p. 655).

In *Chicago etc. R. Co. v. Devine*, U. S. Adv. Ops. 1915, p. 27, a motion to affirm a judgment in favor of the employe was granted on the ground that the propositions advanced in support of the writ of error were so wanting in substance as not to require further argument. One of these propositions was that the state statute limiting the amount or recovery was controlling, although the suit was under the act of Congress. On this point the Court said:

> "And the same conclusion is necessary as to the second, because in substance and effect the want of merit in that proposition has, by necessary intendment, been so conclusively established by the previous decisions of this court concerning the exclusive operation and effect of the employers liability act over the subject with which it deals as to exclude all ground for the contention which the proposition makes."

In *Atlantic Coast Line R. R. Co. v. Burnette,* U. S. Adv. Ops. 1915, page 76 the Court said:

> "In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont R. Co. v. White,* 238 U. S. 507, 511; 59 L. Ed., 1433, 1436; 35 Sup. Ct. Rep. 865. But, irrespective of the fact that the act of Congress is paramount, when a law that is relied on as a source of an obligation in tort sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. * * * * * * At all events, the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source."

C. Specific examples of cases in this court and elsewhere holding the Federal Employers' Liability Act to be exclusive of State laws.

The principles stated in the quotations from the cases in this court cited under (B) have been applied both by this and other courts to a variety of circumstances. We call attention to these as bearing on the point that it was the purpose of Congress to cover the subject matter not merely of the right of servants of common carriers by railroad to recover damages in cases of negligence, but the entire field of liability by such carriers when engaging in interstate commerce to their employees when employed in such commerce.

1. The Federal statute of 1908 limits the recovery in the event of death to the pecuniary damage sustained by the widow or the next of kin

named in the statute and does not permit a recovery for the pain suffered by the injured employe before death, although under the State statute such recovery might be had.

St. Louis etc. Ry. Co. v. Hesterly, 228 U. S. 702; 57 L. Ed. 1031;
Michigan Central R. R. v. Vreeland, 227 U. S. 59; 57 L. Ed. 417;
Gulf etc. Ry. Co. v. McGinnis, 228 U. S. 173; 57 L. Ed. 785;
Fulgham v. Midland Valley R. R., 167 Fed. 660;
Walsh v. New York etc. R. R., 173 Fed. 494.

2. Under the amendment of April 5, 1910, the personal representatives of a deceased employe may recover damages not only for pecuniary loss but also for the pain and suffering of the decedent during the period of his survival after a fatal accident without regard to the provisions of any State statute on this subject.

St. Louis etc. Ry. Co. v. Craft, 237 U. S. 648; 59 L. Ed., 1160.

3. Suits under the Federal Act for damages by reason of accidents resulting in death must be brought by the personal representative of the decedent, as required by that Act, and cannot be brought by the beneficiaries, although the State law permits or requires such actions to be brought by the beneficiary.

Missouri etc. Ry. Co. v. Wulf, 226 U. S. 570; 57 L. Ed. 355;
Troxell v. Delaware etc. R. R. Co., 227 U. S. 434; 57 L. Ed. 586;

Winfree v. Northern P. R. Co., 227 U. S. 296; 57 L. Ed. 518;
St. Louis etc. Ry. Co. v. Seale, 229 U. S. 156; 57 L. Ed. 1129;
Dewberry v. Southern Ry. Co., 175 Fed. 307;
Fithian v. St. Louis etc. R. Co., 188 Fed. 842;
Cory v. Lake Shore etc. R. Co., 208 Fed. 847;
Armbruster v. Chicago etc. R. Co., 147 N. W. 337 (Iowa);
LaCasse v. N. O. T. & U. R. Co., 64 So. 1012 (La.);
Penny v. New Orleans etc. R. Co., 66 So. 313, 135 La. 962;
Kamboris v. Oregon etc. R. Co., 146 Pac. 1097 (Ore.);
Flanders v. Georgia etc. Ry. Co., 67 So. 68 (Fla.);
Howard v. Nashville etc. Ry. Co., 179 S. W. 380 (Tenn.);
Corbett v. Boston & M. R. R., 107 N. E. 60, 219 Mass. 351.

4. The manner of distribution of the amount recovered in an action for death of an employe is determined by the provisions of the Federal Statute and not by those of the State law.

Taylor v. Taylor, 232 U. S. 363, 58 L. Ed. 638;
McGarvey's Guardian v. McGarvey's Admr., 173 S. W. 765, 163 Ky. 242;

5. The Federal statute is controlling on the question of the limitation of time within which actions must be commenced, and hence the two

year limitation provided by section 6 supersedes the State law on that subject.

Atlantic Coast Line R. Co. v. Burnette. U. S. Adv. Ops. 1915, 76;
Shannon v. Boston & M. R. R., 92 Atl. 167; 77 N. H., 349;

6. The Federal statute is controlling on the question of the right of non-resident aliens to maintain an action for the death of relatives.

McGovern v. Phila. & R. R. R., 235 U. S. 389; 59 L. Ed., 283;

7. Provisions of a state statute requiring that written notice of the particulars of claims arising from accidents be served upon the carrier employer are unavailable as a defense in those cases to which the Federal statute applies.

Chicago etc. Ry. Co. v. Pearce, 175 S. W. 1160 (Ark). As to a statute of a territory, see *El Paso etc. R. Co. v. Gutierrez*, 215 U. S., 87; 54 L. Ed., 106.

8. In actions under the Federal Employers' Liability statute the Federal law as to the burden of proof of contributory negligence controls to the exclusion of the State law.

Toledo etc. R. R. Co. v. Slavin, 236 U. S. 454; 59 L. Ed., 671;
Central Vermont Ry. Co. v. White, 238 U. S., 507, 512; 59 L. Ed., 1433;
Gee v. Lehigh Valley R. R., 148 N. Y. Supp., 882; 163 App. Div., 274.

So, also, as to comparative negligence of employer and employe.

Chicago, etc., R. Co. v. Wright, U. S., Adv. Opns., 1915, page 185.

9. The defense of assumption of risk remains in all cases except those where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of the Federal statute; such defense is therefore available in suits under the Federal statute even though it has been abolished by a State statute.

Seaboard Air Line Ry. v. Horton, 233 U. S., 492; 58 L. Ed., 1062; see also U. S. Adv. Opns., 1915, p. 180;
Toledo etc. R. R. Co. v. Slavin, 236 U. S. 454; 59 L. Ed. 671;
Miller v. Kansas City etc. Ry. Co., 168 S. W. 336; 180 Mo. App. 371;
Oberlin v. Oregon etc. R. Co., 142 Pac. 554 (Ore.);
Lauer v. Northern Pacific Ry. Co., 145 Pac. 606 (Wash.);
Hawkins v. St. Louis etc. R. Co., 174 S. W. 129 (Mo.);
Cross v. Chicago etc. R. Co., 177 S. W. 1127 (Mo.);
Texas & Pacific R. Co. v. White, 177 S. W. 1185 (Tex.);
Schuede v. Zenith S. S. Co., 216 Fed. 566.

10. In cases to which the Federal Act is applicable, the provisions of state statutes limiting the amount of recovery are unenforceable.

Chicago etc. Ry. Co. v. Devine, U. S. Adv. Ops. 1915, p. 27;
Grybowski v. Erie R. R., 95 Atl. 764 (N. J. Sup. Ct.).

D. The exclusive nature of the Federal statute in interstate cases is not affected by the title thereof.

The title of the Act of 1908 is "An act relating

to the liability of common carriers by railroad to their employees in certain cases." It has been suggested that from this title there may be inferred a purpose on the part of Congress to apply the statute only to those cases where there would be liability on the part of the railroad carrier by reason of negligence on its part or on the part of any of its officers, agents or employes—as distinguished from those cases where there would be no such liability because there was no such negligence.

Winfield v. N. Y. Central R. R. 153 N. Y. Supp. 499, 168; App. Div. 351.

We submit that there is no force in this suggestion. The legislative and judicial history of the Federal Employers' Liability Acts shows that the expression "in certain cases" in the title of the Act of 1908 merely indicates a purpose to limit the application of the statute to cases of accidents which may occur while the railroad carrier is engaging in interstate commerce and the employe is employed in such commerce, as distinguished from those cases wherein the carrier is not engaged nor the employe so employed.

The first Federal Employers' Liability Act passed by Congress was approved June 11, 1906. See 34 Stat. at Large, 232, Chapter 3070. This act was reviewed by this Court in the Employers' Liability cases, 207 U. S., 463; 52 L. Ed., 297, and declared unconstitutional because its terms included all who were engaged in interstate commerce between the states—steam railroads, telegraph lines, telephone lines, express business, vessels of every kind whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines &c., as carriers as well as all their employees, regardless of whether the employer was engaging

in, or the injured servant was employed in, interstate commerce at the time of the injury. The Court in this regard said at page 498:

> "The Act then being addressed to *all* common carriers engaged in interstate commerce, and imposing a liability upon them in favor of *any* of their employees, *without qualification or restriction as to the business in which the carriers, or their employees may be engaged at the time of the injury,* of necessity includes subjects wholly outside of the power of Congress to regulate commerce" (italics ours).

The Act therefore included *every* individual or corporation engaged in interstate commerce between the states and *all* their employees, and was held to be broader than the constitutional power delegated by the states to the National Government. The Act, however, was declared valid as to the District of Columbia, and the Territories of the United States, for the reason that Congress has plenary powers in all matters relating to such Territories. (See *El Paso etc. R. Co. v. Guiterrez,* 215 U. S. 87; 54 L. Ed. 106.)

As to common carriers engaged in commerce between the states, the majority opinion held, that matters under the jurisdiction of the National Government, and those within the sole jurisdiction of states were so blended in the Act, that they could not be separated by the Court, and that therefore the whole Act as to common carriers and their employes engaged in commerce between the states must be held void.

This decision of the Supreme Court was handed down on January 6th, 1908. Immediately thereafter on April 22, 1908 Congress passed the so-called Second Federal Employers' Liability Act, 35 Stat. at Large, 65, Chapter 149. A comparison of the two acts shows beyond any question

that this later Act was passed in order to obviate the defects of the first Act, as pointed out by the decision above referred to. Following are copies of the titles and of the first section of the first and second Acts set in parallel columns:

EMPLOYERS' LIABILITY ACTS.

(Act of 1906.)	(Act of 1908.)
An Act relating to liability of common carriers in the District of Columbia and Territories, and common carriers engaged in commerce between the States and foreign nations to their employes.	An Act relating to the liability of common carriers by railroad to their employes in certain cases.
(Act of 1906.)	(Act of 1908.)
Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several States, or between any Territory and another or between any Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia, and any State or States, or foreign nations, shall	Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury

be liable to any of its employes, or in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, ways or works.	while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe; and if none, then to such employe's parents, and if none, then to the next of kin dependent upon such employe for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

It is a familiar rule in the construction of statutes that

> "For the purpose of removing ambiguities in the language of the statute it must be read with reference to all the facts and circumstances connected with its enactment, such as the history of the times, the state of the existing law, and the evils to be remedied by the new act" (36 Cyc., 1137).

As was said in *Keyport Steamboat Company v. Farmers' Transportation Company*, 18 N. J. Eq. 1, 24:

> "Circumstances known to all the public such as what the law was at the time, or what it was supposed to be, are proper to be considered in looking for the intention of the Legislature when not explicitly expressed."

In *Holt v. Akarman*, 84 N. J. Law, 371, 377 the Court said:

> "The legislative intent was to deal with all phases germane to the subject matter of the Act. To comprehend the full force and scope of it, due regard must be had to the old law, the mischief resulting therefrom, and the enacted legislative remedy for the eradication of the evil."

It is submitted that the expression "in certain cases" should not be construed to refer to cases where there is no liability under the Federal statute as distinguished from cases where there is liability thereunder. A comparison of the first and second Federal statutes as above set forth, in the light of the opinion of this Court in the First Employers' Liability Cases, *supra,* shows that this expression refers merely to those cases where the present Federal statute is applicable as distinguished from those cases where it is not; in the latter cases the carrier may be engaged generally in interstate commerce, yet because at the time of the accident it is not actually so engaging nor the employe so employed there is no right of action under the statute. The expression simply draws a distinction between one set of facts where the carrier is engaging and the employe is employed, in interstate commerce, and another set of facts where the carrier at the time of the accident is not engaging and the employee is not employed, in interstate commerce.

The only case decided by a Court of final review, directly passing upon the point we are discussing, is *Staley v. Illinois Central Railroad Company* (Supreme Court of Illinois), 109 N. E. Rep. 342. At page 349 the court discusses the meaning of the phrase "in certain cases" in the title of Federal Employers' Liability Act, and says:

> "We think the phrase 'in certain cases' was inserted in this title to obviate some of the defects suggested in the title of the Act held unconstitutional in 207 U. S. 463, supra, and that the 'certain cases' was meant to limit it to those cases where the liability arose in interstate commerce."

E. Cases dealing with the question of the right to compensation under state laws in the absence of negligence when the carrier is engaging, and the employe is employed in interstate commerce.

We have cited under subhead (C) a variety of cases wherein the Federal statute has been held to supersede state laws in certain aspects. The question in the present case of whether state compensation laws may be applied in the absence of negligence has also been under consideration.

In the courts of New Jersey there has been a difference of opinion on this point. In *Whitecraft v. Penn. R.R. Co.*, 36 N. J. Law Journal, 182, the Judge of the Common Pleas of Camden County held that he had no jurisdiction to allow compensation under the New Jersey statute in a case which came under the Federal statute. The opinion, however, does not show whether or not the accident resulted from negligence.

In *Newbaker v. New York etc. R. R.*, 38 N. J. Law Journal, 175, the Common Pleas Court of

Warren County permitted compensation under the state law in a case where the accident happened without any negligence, on the ground that the Federal Statute did not apply to the case of such an accident. The report, however, shows that the court held that the accident occurred in intrastate commerce (p. 178). It was therefore unnecessary to pass upon the question of whether compensation should be allowed under the New Jersey statute in a case of an accident without negligence, coming within the terms of the Federal statute.

In *Rounsaville v. Central R. R.*, 37 N. J. Law Journal, 295, the Common Pleas Court of Warren County held that the case came under the terms of the Federal statute, and that therefore no allowance could be made under the New Jersey Compensation Act although the accident happened without negligence.

This decision was afterwards reversed by the New Jersey Supreme Court on the ground that the Federal statute was not applicable to cases of accidents resulting without negligence even though the carrier was engaging, and the employe was employed, in interstate commerce and therefore the Federal statute would have been applicable but for the absence of negligence. See 94 Atl. 392.

The last named decision was followed in *West Jersey Trust Co., Admr. v. Phila. & Reading R. R.*, 95 Atl. 753, reversing 37 N. J. Law Journal 108.

Another branch of the New Jersey Supreme Court held directly to the contrary of the *Rounsaville* and *West Jersey* decisions; this conclusion being reached in the present case, and also in the case of *Hopkins v. Port Reading R. R.*, affirming 38 N. J. Law Journal, 19, and *Lincks v. Erie*

R. R., reversing 38 N. J. Law Journal, 81. (Opinions of Supreme Court not yet reported. See Appendix).

The Court of Errors and Appeals of New Jersey in the present case agreed with that branch of the Supreme Court which decided the *Rounsaville* case.

It may be observed in this connection that still a third branch of the New Jersey Supreme Court, in *Grybowski v. Erie R. R.*, 95 Atl. 764, wherein the carrier was engaging and the employe was employed in interestate commerce, brought in the state court to recover damages by reason of an accident resulting from negligence, refused to limit the recovery to the amount fixed by the implied agreement under Section 11 of the New Jersey statute, saying:

> "It has been held by the United States Supreme Court that the Federal Employers' Liability Act of 1908 superseded all state laws upon the subject of the liability of carriers by railroad engaged in interstate transportation, to their workmen injured while employed in such commerce (citing cases). The necessary corollary of this judicial declaration is that no state, by subsequent legislation, can impair or curtail in any degree the rights conferred upon the employe, or his personal representative, or the liabilities imposed upon the carrier, by that statute" (p. 766).

The point has also been under consideration in the New York Court of Appeals. In the case of *Winfield v. New York Central R. R.*, 110 N. E. 614, 216 N. Y. 284, that court affirmed the decision of the Appellate Division which, by a vote of three to two, had decided that compensation might be made under the New York Workmen's

Act of 1914 when the accident happened without negligence, although if there had been negligence the Federal statute would then have been applicable by reason of the fact that the proofs showed that the carrier was engaging and the workman was employed in interstate commerce at the time of the accident. See 153 N. Y. Supp. 499; 168 App. Div. 351. This case is now before this Court for review on this and other points.

The decision of the New York Court of Appeals in this case was based upon the theory that "in enacting the Federal Employers' Liability Act it (i. e., Congress) intended to occupy and exclusively preempt the field in which the liability of certain employers engaged in interstate commerce to their employes is prescribed when the latter were injured as the result of negligence." This conclusion, we submit, is the result of confusing that which is regulated with the manner in which it is regulated. What Congress regulated was the relation of master and servant when both are engaged in interstate commerce; for that purpose it provided among other things that the master should be liable if negligent and that certain defenses previously available should be abrogated in whole or in part. The language of the Federal statute, we submit, shows that the liability described thereby does not depend upon whether the employe is injured *as the result of negligence,* but upon whether he is injured while the carrier is engaging in interstate commerce and while he is employed by the carrier in such commerce.

On the other hand it has been held in California in the case of *Smith v. Industrial Accident Commission,* 147 Pac. 600, that the Federal statute governs the entire liability of the carrier for in-

juries to its employes and bars compensation under the said state law in all cases to which the Federal act is applicable, including cases of accidents not caused by negligence.

A similar conclusion was reached by the Supreme Court of Illinois in the case of *Staley v. Ill. Cen. R. R. Co.*, 109 N. E. 342; after citing and discussing numerous cases in this and other courts it was said:

> "In none of the decisions cited and relied on by counsel for plaintiff in error was anything said that in any way limited or modified the doctrine laid down in the decisions heretofore considered, that Congress by the Federal Employers' Liability Act intended to occupy the field of employes' liability to employes for all injuries occurring on railroads while engaged in interstate commerce. Under those decisions the conclusion is inevitable that in a suit to recover for an injury on a railroad occurring while the employer and employe were engaged in interstate commerce, the Federal Employers' Liability Act alone would control and could not be pieced out or supplemented by a State statute. The decedent having been engaged, at the time of his death, in interstate commerce, the recovery must be had, if at all, under and subject to the provisions of the Federal Employers' Liability Act."

This last mentioned case is precisely in point, as the statute of Illinois has a provision similar to that of New Jersey with respect to the presumption that the compensation provisions of the statute shall apply unless notice be given to the contrary; the Illinois statute also has another provision similar to that of the New Jersey act, enacting that those who do not pay compensation are deprived of certain of the common law de-

fenses such as assumption of risk, negligence of a fellow-servant and contributory negligence. See laws of Illinois, 1913, p. 335.

In this connection attention should also be called to certain other cases in which the question under consideration is discussed or suggested. Thus in *Hammill v. Penn. R. R. Co.*, 94 Atl. 313, the same branch of the New Jersey Supreme Court which decided the *Rounsaville* case, *supra,* said that the Federal act was intended to apply to a case where no claim of negligence on the part of the employer could reasonably be made. However, this case did not turn upon that point as the workman was not employed by the railroad in its capacity as "a common carrier by railroad," but was employed on the Delaware & Raritan Canal as a boatman. It was held that the Federal Statute did not apply because the defendant as the employer "was operating a canal and not a railroad."

In *Jensen v. Southern P. Co.*, 109 N. E. 600, 215 N. Y. 514, it was held that the Federal statute applied only to railroads and therefore did not exclude recovery under the state compensation law, because so far as the case under consideration was concerned the railroad was a carrier by water, and it did not appear that its transportation by means of steamship was in any way related to transportation by railroad. The workman in that case was killed while unloading a steamship which was berthed alongside of a pier in the Hudson River.

In *Kennerson v. Thames Tow Boat Co.*, 94 Atl. 372, it was held that the workmen's compensation act of the State of Connecticut applied to an employe who was killed in the course of his em-

ployment while working on a boat which was navigating the waters of another state. The opinion states that there is nothing in the record to indicate that the accident happened while the employe was engaged in interstate or foreign commerce and then continues:

> "Congress has not as yet legislated in regard to injuries occurring in interstate commerce by water; the state therefore may."

In *Walker v. Clyde Steamship Co.*, 109 N. E. 604, 215 N. Y. 529, claimant was injured on a steamship lying alongside of a pier in the Hudson River. It was claimed that the New York Workmen's Compensation Act did not apply because the case was exclusively one of admiralty jurisdiction. The court decided otherwise, on the ground that prior to the passage of the New York statute an injured employe had his option to sue either at common law or in admiralty and that the remedy provided by the state court was merely a substitute for the common law remedy and that therefore the injured employe still had his option to proceed either under that statute or in admiralty.

The same reasoning was applied by the U. S. District Court for the District of New Jersey in *Berton v. Tietjen & Lang Dry Dock Co.*, 219 Fed. 763, where the petition of the defendant for limitation of liability under the admiralty law was denied, and the petition of the plaintiff to remand to the Hudson County Court of Common Pleas in the State of New Jersey was granted—it appearing that his petition was filed under the New Jersey Compensation Act and that the accident happened without negligence while the plaintiff was working upon a vessel in defendant's dry

dock. The court decided that the contract of hiring was not maritime, and that therefore the state courts had "concurrent" jurisdiction and the action was not removable as one arising under the admiralty law.

The conclusion reached in the *Walker* case *supra* is at variance with that reached by the Supreme Court of the State of Washington in the case of *Jarvis v. Daggett*, 151 Pac. 648, where it was held that the Workmen's Compensation law of that state did not apply to cases of admiralty jurisdiction; and that therefore an employe injured under such circumstances as to confer jurisdiction upon the court of admiralty must pursue his remedy in that court alone, and could not bring proceedings under the State Compensation Act.

To the same effect see *Schuede v. Zenith S. S. Co.*, 216 Fed. 566, where it was held that in case of an injury to a seaman the maritime law determines his rights to the exclusion of the law of the State where the injuryoccurred and the suit is brought, and that therefore the Ohio Employers' Liability Act did not apply to such a case.

F. It was the intention of Congress to cover the the entire field of Employers' Liability in all cases where a carrier by railroad was engaging and its employes were employed, in interstate commerce. In such cases the Federal statute covers the same field as the New Jersey statute and is therefore exclusive of the latter.

Assuming that in the present case the facts as found by the New Jersey Supreme Court show that the defendant at the time of the accident was a common carrier by railroad engaging in inter-

state commerce and that the employe was injured while employed by such carrier in such commerce, so as to come within the terms of the Federal Employers' Liability Act, the precise question now presented is this; in a case where there is no proof of negligence, can the dependent of a deceased employe recover compensation according to the provisions of the State law providing for compensation in all cases regardless of negligence, when the carrier and the employe were operating under the contract implied by the New Jersey statute?

In order to determine the answer to this question, it will first be necessary to examine the scope and purpose of the New Jersey Compensation Act. (NOTE: For the convenience of the Court complete copies of this statute in pamphlet form are submitted with this brief.)

SUMMARY OF NEW JERSEY COMPENSATION ACT.

By chapter 95, Laws of 1911, the Legislature of the State of New Jersey enacted a statute entitled

> "An act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder."

By section 1 of said statute it is provided that when personal injury is caused to an employe by accident arising out of and in the course of his employment, of which the negligence of the employer is the proximate cause, the employe shall receive compensation therefor, provided he himself is not willfully negligent; it further provides that the right to compensation under sec-

tion I shall not be defeated on the ground of negligence of a fellow employe or on the ground of assumption of risk—both of which grounds of defense are expressly abolished.

The following is a copy of those paragraphs of section I which deal with the above subjects:

> "BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:
>
> "SECTION I. COMPENSATION BY ACTION AT LAW.
>
> "1. When personal injury is caused to an employe by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employe was himself not willfully negligent at the time of receiving such injury, and the question of whether the employe was willfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.
>
> "2. The right to compensation as provided by section I of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employe; or that the injured employe assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances; which said grounds of defense are hereby abolished."

Paragraph 3 of section I provides that the existence of an independent contract or sub-contract shall not bar the liability of the employer in certain cases.

Paragraph 4 reads into the statute the pro-

visions of the New Jersey Act providing for the recovery of damages in cases of death by wrongful act, neglect or default.

Paragraph 5 places upon the defendant the burden of proof to establish wilful negligence.

Paragraph 6 requires that claims for legal services be approved by the trial judge.

By section II of said statute it is enacted that when the employes and the employe shall by agreement, either express or implied, accept the provisions of said section II, compensation for injuries or death by accident arising out of and in the course of employment shall be made by the employer without regard to negligence of the employe, according to a certain schedule contained in said statute in all cases except when the injury or death is intentionally self-inflicted or when intoxication is the proximate cause of injury, and that said agreement shall be a surrender by the parties of their rights to any other method, form or amount of compensation or determination thereof than as provided in said section II and an acceptance of all the provisions of said section, and shall bind the employes and his personal representatives, widow and next of kin. It is further provided that every contract of hiring made subsequent to the time provided for the act to take effect shall be presumed to have been made with reference to the provisions of said section II, and unless there be as a part of such contract an express statement in writing prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II were not intended to apply, then it shall be presumed that the parties had accepted the pro-

visions of section II and agreed to be bound thereby.

In case of failure to agree upon a claim for compensation either party may submit the claim to the judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case.

The following is a copy of the provisions in question:

SECTION II. ELECTIVE COMPENSATION.

"7. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employe by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.

"8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of section II of this act, and shall bind the employe himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

"9. Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been

made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby. In the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

* * * * *

"18. In case of a dispute over, or failure to agree upon a claim for compensation between employer and employe, or the dependents of the employe, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding."

Shortly after this statute went into effect it was attacked as unconstitutional on a variety of grounds, but none of them involved the question presented by the present case. The statute was sustained.

See

Sexton v. Newark District Telegraph Co., 86 Atl. 451; 84 N. J. L. 85; affirmed 91 Atl. 1070; 86 N. J. L. 701.

Subsequently, the question of the right of an employe or his dependents to recover compensation in cases of accident arising without negligence while the carrier was engaging in interstate commerce and the employe was injured while employed in such commerce, came up and various conclusions were reached. The cases on this subject have been cited under subhead (E).

We now urge that the decision of the Court of Errors and Appeals of New Jersey reversing the decision of the Supreme Court of that State in the present case is erroneous for the reason that it was the intention of Congress in passing the Employers' Liability Act to cover the entire field and to deal with the whole subject matter of the liability of common carriers by railroad to their employes in all of those cases to which the statute, by its terms, was applicable; and as a necessary incident, to exclude any action by the state in such cases. That such was the intention of Congress we submit may be deduced from a consideration of (1) the statements of this Court in construing the Federal statute, (2) the necessary implications found in the statute itself, (3) the message of the President and the reports of legislative committees and (4) conflict between the Federal statute and the New Jersey compensation statute.

1. DICTA OF THIS COURT. In *Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, in discussing the constitutionality of those provisions of the Federal statute which removed or impaired certain defenses that were available at common law, such as negligence of a fellow-servant, contributory negligence and assumption of risk, it was said (italics ours):

"The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end, tends to promote the safety of the employes and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution (citing cases). We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, *operating uniformly* in all the states upon *all* carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce (citing cases). * * *

"Coming to the question of classification, it is true that the liability which the Act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit *of all employes of such carriers by railroad who are employed in interstate commerce*, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employes in such commerce, not within the Act, are exposed" (pp. 51, 52).

In *Philadelphia, etc., R.R. Co. v. Schubert*, 224 U. S. 603; 56 L. Ed. 911, it was held that the right of an employe to recover under the Federal law was not barred by the acceptance of benefits under the terms of the carriers' "Relief Fund." In the course of the opinion it was said:

"When it (Congress) decided to protect the safety of employes by establishing rules

> of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective."

In *Michigan Central R. R. v. Vreeland*, 227 U. S. 59; (57 L. Ed. 417), at p. 66, the court said:

> "We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury."

In *Seaboard Air Line v. Horton*, 233 U. S. 492, (58 L. Ed. 1062), at p. 501, this court, referring to section 1 of the statute, said (italics ours):

> "This clause has two branches: the one covering the negligence of any of the officers agents, or employes of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employe of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. *But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence.*"

In *McGovern v. Phila. & Reading R. Co.*, 235 U. S. 389; 59 L. Ed. 283, it was held that the benefits of the Federal statute extended to non-resident aliens and gave them the right to maintain actions under that statute for damages caused by death of relatives. In reaching this conclusion the court cited several cases on the subject of the right of non-resident aliens to recover damages in actions brought under statutes giving the right to recover damages for wrongful death, and then said:

"We may refer to these cases for their reasoning without reproducing it, and need not do much more than add that the policy of the Employers' Liability Act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of railroad companies" (p. 399).

2. THE IMPLICATIONS IN THE FEDERAL STATUTE.

In order to give a reasonable construction to the statute it is necessary to read certain implications therein; thus in section 3 the subject of contributory negligence on the part of the employe is considered; and it is enacted that the fact that the employe may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; there is nothing in this section which expressly provides that in a case of contributory negligence the employe shall be entitled to recover damages; all it provides is that contributory negligence shall not "bar" a recovery, but no one would suggest that the failure to expressly provide for a partial recovery in a case of contributory negligence bars the employe from any recovery at all under such circumstances.

Thus, also, in section 4 we find the provision that the employe shall not be held to have assumed the risk in any case where the violation by the carrier of any statute enacted for the safety of employes contributed to the injury or death. The implication from this section is not, perhaps, quite so clear as that in section 3 but whatever doubt there may have been on the subject has been settled by this court in *Seaboard Air Line v. Horton*, 233 U. S. 492; 58 L. Ed. 1062, and

Southern Ry. Co. v. Crockett, 234 U. S. 725; 58 L. Ed. 1564, holding that this section by eliminating the defenses of assumption of risk in the case specified therein "quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." See 233 U. S. at p. 503.

Again in dealing with Section 5 this Court held that the provisions thereof making void any contract, etc., the purpose and intent of which "shall be" to enable any carrier to exempt itself from any liability created by the act was applicable to existing, as well as to future contracts. See *Phila. etc. R. Co. v. Schubert,* 224 U. S. 603; 56 L. Ed., 911; *Chicago & Alton R.R. Co. v. Wagner,* U. S. Adv. Op., 1915, p. 135.

The foregoing are illustrative of what the Courts have held to be necessarily implied in the statute. The same principle, we submit, as has been held applicable to various other sections of the statute should also be held applicable to section I.

As was said in the case of *Savage v. Jones,* 225 U. S. 501; (56 L. Ed. 1182) at page 533:

> "The entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed."

Turning back to section 1 of the statute, we find that it provides that in certain cases therein stated every common carrier by railroad "shall be liable in damages" to certain employes injured or killed, "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances,

machinery, track, roadbed, work boats, wharves or other equipment."

Section 2 has similar provisions applicable to cases arising in the Territories, the District of Columbia, the Panama Zone or other possessions of the United States.

Sections 1 and 2 have a two-fold purpose; first, to take away the defense of negligence of a fellow-servant; second, to make the carrier liable in all cases of accident due to its own negligence, the words used being broad enough to cover every possible accident that might result from the negligence of the carrier itself as distinguished from the negligence of fellow-servants. See *Seaboard Air Line v. Horton*, 233 U. S. 492, at page 501; *DeAtley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591, at p. 595. The first of these two provisions operated to change the common law by removing the defense of negligence of a fellow-servant, but the second is merely declaratory of the common law.

We therefore urge that the necessary implication from the general scheme of the statute and the language thereof is that it was the intention of Congress to compel the carrier to respond in damages only in cases of negligence which come within the terms of the statute; and not to require the carrier to respond in damages in those cases which come within the terms of the statute, but which result without negligence on the part of the carrier or any of its officers, agents or employes.

> "The Congress having legislated upon this phase of interstate commerce, such legislation is exclusive, and its non-action, in cases of accident without negligence, is a declaration

that it shall remain free from said legislation."

(Opinion of Warren Common Pleas in case of *Rounsaville v. Central R. R.*, 37 N. J. Law Journal; 295, at p. 298.)

In the case of *Winfield v. New York Central R. R.*, 110 N. E. 614, 216 N. Y. 284, it is said that the view Congress intended to observe as to the distinction between a liability statute and a compensation statute is "fortified" by the fact that it has passed a compensation law exclusively applicable to Federal employes, in which liability is imposed without regard to negligence (35 U. S. Stat. 556; U. S. Comp. Stat. 1913, §§8923-9). If this fact has any bearing at all on the point under consideration, we submit that so far from indicating that Congress intended in the Federal Employers' Liability statute to limit the application of that statute to cases where compensation could be obtained only in cases of negligence and thereby to leave to the states the power to pass statutes requiring compensation in accidents arising without negligence, it rather shows the contrary because if Congress had intended thus to limit the Employers' Liability statute it might readily have said so. Moreover, Congress might well have one theory of liability for accidents arising in employments under the commerce clause and an entirely different theory of liability for accidents arising under laws which are not dependent upon its power to regulate interstate commerce.

As bearing upon the claim that the necessary implication of the Federal statute is that there shall be liability where there is negligence and no liability where there is no negligence, we quote

as follows from an editorial in Central Law Journal, Vol. 82, page 44 (issue of January 21, 1916):

> "It seems to us, therefore, that if we get beyond the federal question involved, we are then confronted with the purpose of the state act, as shown by its procedure to ascertain the measure of liability. But to us it seems clear, that, if the federal act forbids any recovery from an employer except as arising out of negligence, this should be construed to mean that no penalty where there is no negligence should be imposed. The federal act is not alone for the protection of employes, but also it may be deemed for the protection of employers. The whole question, therefore, resolves itself into the inquiry, whether or not there is a strong negative pregnant in the federal act against any penalty being visited on a federal instrumentality where it is not at fault. As federal law has no office merely to right a civil wrong, but to protect federal means, this question ought to be answered in the affirmative."

The same argument expressed in somewhat different language is found in the dissenting opinion of the Appellate Division, New York Supreme Court, in the case of *Winfield v. New York Central R. R.*, from which we quote (153 N. Y. Supp. 503):

> "By section 114 of the Compensation Act it is provided that the provisions of this chapter shall apply to a workman engaged both in intrastate and interstate commerce 'for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly

separable and distinguishable from interstate or foreign commerce.' Congress has assumed to legislate upon the liability of masters to their servants where the masters are engaged in interstate commerce. Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291. These acts provide for a liability in excess of common law liability. Upon the principle of 'expressio unius exclusio alterius,' the acts constitute a denial of liability, except in the cases mentioned. In any event a rule of liability is established by Congress directly within the terms of section 114, and the work in which the claimant was engaged was not severable from interstate commerce. Section 114 seems to contemplate cases where Congress had legislated either as to a rule of liability or as to a method of compensation. It seems to have been within the mind of the Legislature that Congress might hereafter pass a Workmen's Compensation Act. Having limited, however, the effect of this Compensation Act to cases in which either a method of compensation or a rule of liability had been established, the intent would seem clear to exclude all cases where the party was engaged in work not severable from interstate commerce, as long as the rule of liability of master to servant, where the work was performed in connection with interstate commerce, had already been prescribed by Congress."

3. MESSAGE OF THE PRESIDENT AND REPORTS OF COMMITTEES.

The messages of the President may be referred to for the purpose of determining the scope of legislation.

Kepner v. U. S., 195 U. S. 100; 49 L. Ed., 114.

One of the principal motives for the passage of the Federal statute was the desire for uniformity throughout the states. This is indicated by the President's message of January 31, 1908, which was sent to Congress on Jan. 6, 1908, a few days after the First Employers' Liability Act was declared unconstitutional. We quote:

> "Interstate employment being thus covered by an adequate national law, the field of intrastate employment will be left to the action of the several states" (Vol. 8, U. S. Doc. 5241, page 1).

That Congress intended to cover the entire field of the liability of common carriers by railroad to employes in interstate operations is further shown by the reports of certain legislative committees. These reports may be examined in order to determine the purpose of Congress in enacting a statute and the scope and effect thereof.

> *Holy Trinity Church v. U. S.*, 143 U. S. 457, 464; 36 L. Ed., 226;
> *Chesapeake etc. Tel. Co. v. Manning*, 186 U. S. 238, 246; 46 L. Ed., 1127;
> *Binns v. U. S.* 194 U. S. 486; 48 L. Ed., 1087;
> *St. Louis etc. Ry. Co. v. Craft*, 237 U. S. 648, 661; 59 L. Ed. 1160.

We quote from the report of the Committee on Judiciary, House Rep. 1386, 60th Cong., 1st Sess., in Vol. 2, U. S. Doc., 5226:

> "It (the present bill) is intended in its scope to cover all commerce to which the regulative power of Congress extends" (page 1).

Again:

> "By this bill it is hoped to fix a uniform

> rule of liability throughout the Union with reference to the liability of common carriers to their employes" (page 1).

Again:

> "It will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employers' liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the states" (page 3).

Again, from the report of Committee on Education and Labor, Sen. Rep. 460, 60th Cong. 1st Sess., in Vol. 2, U. S. Doc. 5219, at page 2:

> "Yet somebody must assume these risks, and the tendency throughout the world in those countries where the industrial life of the community is thoroughly organized has been to modify the doctrine of negligence so as to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged; that is, upon the whole community. The proposed measure is intended to effect this reasonable reformation in our industrial code."

The question of whether it would be expedient to make interstate carriers liable, regardless of negligence, was considered and rejected by both committees. We quote from the report of the Committee on Education and Labor, *supra*, at (page 3).

> "The provisions of this bill do not go to the extreme length of making the employer liable without reference to the negligence of the workman, although many wise and good men think that that ought to be done. * * * Undoubtedly the time is coming when a

> liberal scheme of compensation to injured employes will become general in the United States either under wise provisions of law or through the voluntary actions of our great corporations."

See also Report of Committee on Judiciary, *supra,* at (pp. 96 and 98).

In this connection attention may also be called to the debates in the U. S. Senate at the time of the enactment of the Federal statute of 1908. Senator Bacon said:

> "The day it is passed every state law which prescribes a rule of liability for an employe engaged in interstate commerce is annulled and it is the same as if it had been the repeal of the law of the state."

(Quoted from decision of the Court of Common Pleas of Warren County, N. J., in *Rounsaville v. Central R. R.*, 37 N. J. Law Journal, 295 at page 297).

4. CONFLICT BETWEEN THE FEDERAL STATUTE AND THE NEW JERSEY COMPENSATION STATUTE.

The question of whether an act of Congress supersedes a statute of the state depends largely upon whether the two laws are in conflict; if they are, then the state law must yield.

> *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426; 51 L. Ed., 553;
> *No. Pac. R. Co. v. Washington,* 222 U. S. 370, 379, 56 L. Ed. 237;
> *So. Ry. Co. v. Reid,* 222 U. S. 424 442, 56 L. Ed. 257;
> *Savage v. Jones,* 225 U. S. 501, 533, 56 L. Ed. 1182.

That there is such a conflict between the Fed-

eral Employers' Liability act and the New Jersey Compensation act is apparent from a comparison of the two laws.

Thus we find that section 1 of the Federal act provides for liability in case of accident resulting in whole or in part from the negligence of any of the officers, agents or employes of the carrier or by reason of any defect or insufficiency due to its negligence in its cars &c. Paragraph 1 of the New Jersey act provides for "compensation" to an employe for injury caused by an accident of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause; paragraph 2 provides that this right to compensation shall not be defeated on the ground of negligence of a fellow employe.

It will be seen that the two statutes cover precisely the same field with respect to (a) liability of the employer in the case of negligence on its part and (b) removal of the defense of negligence of a fellow servant.

Section 3 of the Federal act removes the defense of contributory negligence to a limited extent and provides a method for estimating the comparative negligence of the employe and the employer; paragraph 1 of the New Jersey act after reciting that the employe shall be entitled to compensation in the event of negligence on the part of the employer then enacts, "provided the employe was himself not wilfully negligent at the time of receiving such injury."

The section of the Federal act which deals with the subject of contributory negligence does not provide any test of the fact of such negligence but paragraph 23 of the New Jersey Statute (which has been construed to be applicable to

paragraph 1—see *Taylor v. Seabrook*, 94 Atl. 399) provides that "willful negligence" shall consist of (1) deliberate act or deliberate failure to act or (2) such conduct as evidences reckless indifference to safety or (3) intoxication operating as the proximate cause of injury.

The New Jersey act makes no provision for the reduction of damages in the case of contributory negligence on the part of the employe. The conflict between the Federal law and the State law on this subject is obvious.

Section 4 of the Federal act, as construed by this Court in the Horton case, supra, removes the defense of assumption of risk in cases where the violation by the carrier of any statute enacted for the safety of employes contributed to the injury or death, but permits such defense to be made in all other cases.

Paragraph 2 of the New Jersey act enacts that the right to compensation as provided in section I shall not be defeated upon the ground that the injured employe assumed the risks "inherent in or incidently to or arising out of his employment" etc. and expressly abolishes the defense of assumption of risk.

Here again the conflict between the Federal and the State law is obvious.

Section 1 of the Federal act, in case of the death of an employe, allows damages to his personal representative for the benefit of the surviving widow or husband and children of such employe; and, if none, then to the parents and if none then to the next of kin dependent upon him. Paragraph 4 of the New Jersey act provides that paragraphs 1, 2 and 3 shall apply to any claim for the death of an employe arising under the act entitled "An act to provide for the recovery of

damages in cases where the death of a person is caused by wrongful act, neglect or default" approved March 3, 1848 and the amendments and supplements thereto. The New Jersey statute of 1848 (Vol. 2, New Jersey Compiled Statutes of 1910, page 1907) as amended by chapter 287 of the laws of 1913, page 586 provided that

> "The amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, and next of kin of such deceased person, and shall be distributed to such widow, surviving husband, and next of kin, their (in the) proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death to the wife, surviving husband, and next of kin of such deceased person; provided, that where such deceased person has left or shall leave him or her surviving a widow or husband but no children or descendant of any children and no parents, the widow or surviving husband, as the case may be shall be entitled to the whole of the damages which she or he shall sustain and which shall be hereinafter recovered in any such action, and the same shall be paid to her or him."

The present New Jersey statute providing for the distribution of the property of intestates is chapter 47 of the laws of 1914, page 69. For the purpose of the present discussion it is unnecessary to state the details of the method of distribution; it is enough to say that it is settled that if the state law on the subject of recovery of damages in the event of the death of an employe and on the subject of the method of dis-

tribution of such damages is in conflict with the Federal law, the latter is controlling *Taylor v. Taylor* 232 U. S. 363 58 L. Ed. 638.

Section 9 of the Federal act, as amended in 1910, provides for the survival of an employe's action for personal injury in the event of his subsequent death by reason of such injury. *St. Louis etc. Ry Co. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160. A similar provision is found in section IV of the New Jersey act concerning executors. Vol. 2, Comp. Stat. of New Jersey of 1910, page 2260. Prior to the amendment of 1910 the Federal statute of 1908 did not permit such recovery and hence it was held that no such recovery could be had even though the State law permitted it. *St. Louis etc. Ry. Co. v. Hesterly*, 228 U. S. 702; 57 L. Ed., 1031.

Another conflict between the New Jersey statute and the Federal statute is found in the measure of damages. In the case of an injury resulting in death the damages to the widow or next of kin are determined by the pecuniary loss. Substantially the same rule would be applied under Section I of the New Jersey statute, except that, as above shown, there might be a difference in the beneficiaries to whom the damages are payable; but under Section II of the New Jersey statute the damages in case of death are determined by the provisions of the schedule in paragraph 12—being a certain percentage of the wages varying according to the number of dependents, payable for a period of three hundred weeks with a maximum of $10 per week and a minimum of $5 per week.

In cases of personal injuries the compensation to employes under the Federal law would be determined by the jury as at common law; and the

same rules would apply in cases brought under Section I of the New Jersey statute; but under Section II the compensation is determined by the provisions in the schedule of paragraph 11, being 50% of the wages received at the time of injury for a varying number of weeks according to the nature of the injury and the disability resulting therefrom, with a maximum of $10 per week and a minimum of $5 per week.

A further conflict between the State law and the Federal law is found in the provisions relating to insurance and relief benefits. Section 5 of the Federal Act permits the carrier to set-off any sum it has contributed or paid to any insurance or relief benefit or indemnity, etc. The New Jersey Act has no provision permitting the carrier to do this; the only provision on this subject is that "the receipt of benefits from any association, society or fund to which the employe shall have been a contributor shall not bar the recovery of damages by action at law or the recovery of compensation under Section II hereof" (paragraph 23, clause 5).

A further conflict between the Federal law and the State law as construed by the New Jersey Court of Errors and Appeals in the present case is found in the method of enforcing the claims of employes and in defending the rights of employers. If the Federal statute is to be held applicable only to those interstate cases where negligence is proved, and if the State compensation statute is to be held applicable to those cases where there is no negligence, the practical question still remains, who is to determine the fact of the existence or of the absence of negligence upon which the enforcement of the remedy and the de-

fense of the right depends. The question of negligence under the Federal law must be determined by a common law court and jury—either by the jury in the event of disputed facts or by the trial court if there is no dispute of fact on the question of negligence. But under Section II of the New Jersey statute the compensation is given in all cases "without regard to the negligence of the employer;" and in the event of a dispute as to claims for compensation the claim is submitted to a special statutory tribunal created by the statute, to wit, one of the judges of the Courts of Common Pleas of the several counties of the State. Suppose that such statutory tribunal, in a case where the evidence shows without dispute that the carrier was engaging and that the employe was employed in interstate commerce, should conclude that the accident resulted from negligence. Then under the ruling in the present case he would be required to dismiss the petition and remit the employe to his rights under the Federal statute, and that, too, notwithstanding the State statute expressly provides that compensation "shall be made" without regard to negligence. In such a case the question of the presence or absence of negligence is determined by this special tribunal and not by the common law courts whether Federal or State.

Suppose that in another such case there is a dispute in the evidence not only upon the question of negligence, but upon the question of whether the carrier was engaging and the employe was employed in interstate commerce within the meaning of the Federal statute. This fundamental question of fact would also have to be decided by this special tribunal and its decision under para-

graph 18 of the statute is said to be "conclusive and binding." But the carrier is entitled, in the event of a dispute of fact as to the application of the Federal statute and as to the causal negligence thereunder to have those questions determined by the common law courts, sitting with the aid of a jury. We are not now contending that the New Jersey statute as construed in the present case is unconstitutional as depriving the defendant of its right of trial by jury, but are merely calling attention to those cases as illustrating the necessary conflict between the State law and the Federal law with respect to the determination of the rights and liabilities of the respective parties thereunder.

Suppose still a third case, wherein an injured employe brings suit in a common law court to recover damages under the Federal act. The court or the jury, as the case might be, decides either that the Federal statute does not apply on the facts or that the facts do not show negligence, and hence that the employe is not entitled to recover. These are exactly the same questions as were involved in the first and second cases, but now we find that these questions, instead of being decided by the tribunal created by the State statute, are determined by the common law court.

So far as the foregoing provisions of the New Jersey statute are concerned there can be no doubt that they are ineffective, because they are in conflict with the provisions of the Federal statute on the same subjects, but it is said by the New Jersey Court of Errors and Appeals in the present case:

> "What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, but a contractual obligation creat-

ed by section 2 of our Workmen's Compensation Act with the consent of both employer and employe, and which exists although no negligence can be imputed to the employer. And this we consider she is entitled to do in the absence of any averment by her, or any proof offered, or any admission made by the defendant company showing that the death of her decedent resulted from defendant's negligence, and thus created a liability against it under the Federal statute. No such averment is contained in her petition; no such admission appears in the defendant's answer; and no proof of defendant's negligence was offered by either party." (Page 19 of Record).

In reaching this conclusion that Court followed the reasoning of the New Jersey Supreme Court in the *Rounsaville* case (94 Atl., 392), where it was said:

"The Federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. No new right of action is given. All that is done is to take away certain defenses which had come to be thought unjust. The legal liability of the employer under the act does not depend upon the terms of the contract of service, and is neither increased nor diminished thereby. The amount of the pecuniary liability is in no way regulated or limited. The act applies only to certain classes of employers. In all these respects the Workmen's Compensation Act differs. Liability thereunder is contractual, and, while the contract liability is implied from silence, either party is at liberty to adopt or reject the statutory contract. A new right of action is given of a character unknown to our law, at least for several centuries. The liability of the employer depends, not on any fault of his own or his servants, but on whether, by act or by silence he has adopted the statutory

terms. The amount of his pecuniary liability is fixed by statute and not by the verdict of a jury."

We submit that this argument is fallacious for several reasons. In the first place it assumes that Congress did not intend by the enactment of the Federal statute to cover the entire field of the liability of carriers by railroad to their employes in interstate service. This assumption is contrary to the repeated conclusions of this Court and other courts in decisions discussing this very statute (See cases cited under subhead (B) and (C)).

In the second place it assumes that "a mere difference in the theory of recovery upon which the two acts are based is tantamount to a difference in subject matter". (Harvard Law Review, February, 1916, page 42).

So far as the scope of the New Jersey Workmen's Compensation Act is concerned, it covers the same field as that covered by actions ex delicto prior to the passage of said Act. There is no better evidence of this than the title of the Act itself, to wit, (italics ours), "*An Act prescribing the liability of an employer to make compensation for injuries* received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating the procedure *for the determination of liability and compensation thereunder.*"

These questions were the important questions in former tort actions for personal injuries or death. The questions presented to the jury were those relating to the liability of the employer to make compensation for injuries and the determination of the liability and compensation therefor. All the jury had the right to consider was the lia-

bility and the compensation to the injured employe or the personal representatives of the employe in in case of death. It did not have the right to enter the field of conjecture or speculation as to allowance for mental anguish of the relatives of the decedent by reason of the death, or for punitive damages, or what not, but it was limited to awarding a verdict as "compensation" for the injuries suffered. The effort of the State Legislature by its implied contract, and by the alteration of the terminology of the cause of action from an action ex delicto to an action ex contractu, and of the courts so to term the same, certainly cannot make this action cover a different field from that covered by Congress. The field is broader than the mere remedy by which the end to be desired is accomplished.

In the third place, it assumes that by the Federal statute it was the purpose of Congress to "impose" liability in certain cases, and that therefore as to all other cases there was no such purpose. But the Federal Act does not attempt to impose liability; it is merely declaratory of the common law with respect to the negligence of the carrier in interstate service and removes or limits certain defenses which would otherwise have been available at common law.

> "The acts of Congress regulating the liability of railroads to their employes do not affect the cause of action in any way, but abolish certain defenses, such as contributory negligence and assumption of risk. This is entirely consistent with previous (Federal) legislation limiting the extent of the employer's liability for the cause of action." *The Passaic*, 204 Fed. 266, 268.

In the fourth place, it assumes that in *all* cases

where the Federal Act affords no remedy the injured employe or his representative can enforce a remedy given by the state statute. On this point the New Jersey Court of Errors and Appeals said:

> "It cannot be that where the Federal Act affords no remedy—that is, where the death of the employe occurs under such circumstances that no liability is imposed on the carrier by that act—the widow cannot enforce a remedy which is given to her by a state statute." (p. 19 of Record).

If this reasoning is sound, then in every case where there was no remedy under the Federal statute the employe if injured or his dependents, in a case of death, would be entitled to receive compensation under the state statute. But it has been conclusively settled by this court that there are many cases arising under the Federal statute in which the employe cannot receive compensation or enforce the remedy of the Federal statute because recovery is barred by the defense of assumption of risk.

Southern Ry. Co. v. Crockett, 234 U. S. 725; 58 L. Ed. 1564;
Yazoo, etc., R.R. v. Wright, 235 U. S., 376; 59 L. Ed. 277;
Toledo etc. R. Co. v. Slavin, 236 U. S. 454; 59 L. Ed. 671.

In the class of cases of which the foregoing are illustrations there can be no recovery at all under either the State or the Federal statute even under the decision of the New Jersey Court in the present case—none under the State statute, because the accident resulted from negligence, and none under the Federal Act, because the risk assumed by the employe.

Finally, the argument of the New Jersey Court assumes that Section I and Section II of the New Jersey statute may be considered independently of each other. It is true that Section II does not in terms refer to Section I, but both sections are enacted as essential parts of the same statute. The fiction of an implied contract provided for in paragraph 9 of Section II is obviously a mere subterfuge to compel employers to operate under Section II rather than to serve notice thereunder, and thereby submit themselves to the pains and penalties of Section I. It may be that in a case where the point is raised it would be held that the New Jersey statute, though elective in form, so far as the compensation feature is concerned, is compulsory in effect, and is therefore unconstitutional.

Ives v. Southern Buffalo Ry. Co., 94 N. E. 431; 201 N. Y. 271;
Middleton v. Texas etc. Co. 178 S. W. 956 (Tex.):
State Journal Co. v. Workmen's Compensation Board, 170 S. W. 1166 (Ky).

This point is not involved in the present case, but we call attention to it merely as illustrating the argument that Sections I and II of the New Jersey statute must be considered as parts of one whole. The two together form a complete scheme of compensation, but Section II standing by itself is incomplete. The implication specified in paragraph 9 of Section II that the provisions of said Section shall be presumed to have been accepted in the absence of notice to the contrary is based upon the assumption that if the provisions of Section II do not apply then the provisions of Section I shall apply. A necessary part

of the consideration of the contract implied in said Section II is that either party may operate under Section I, but Section I, by reason of the fact that in the aspects hereinbefore set forth is inconsistent with, and covers the same field as, the Federal statute, is superseded by the latter, and the result therefore is that if the interstate employer desires to serve the notice specified in paragraph 9 in order that he may be relieved from the obligation of making compensation without regard to negligence, as provided in Section II, and thus place himself under the provisions of Section I whereby (although he is deprived of certain defenses) it is still necessary for the injured employe to prove negligence—the employer, the moment he brings himself under Section I by serving the notice specified in Section II, suddenly finds himself operating—not under Section I as he had supposed—but under the Federal Employers' Liability Act, which admittedly supersedes the state law and which differs therefrom in certain material respects. We therefore have the anomalous situation where an interstate employer served notice under Section II, thinking that he thereby comes under Section I, but he no sooner comes under Section I of the New Jersey statute than he finds he is immediately ousted therefrom and is compelled to operate under the terms of the Federal statute—this result necessarily following from the fact that Section I is superseded by the Federal statute.

Section II assumes that the employer and the employe have made a binding contract, but if one of the essential parts of the contract fails then the contract itself is unenforceable.

> "There cannot be a statutory contract which fixes the liability of parties unless

> the statutory requirements are accepted and legally enforcible in all its parts. Otherwise that mutuality or agreement of minds, so essential in all valid contracts, would be lacking."

(Opinion of Warren Common Pleas in *Rounsaville* case, 37 N. J. Law Journal, 295, at page 299).

That the two sections of the New Jersey statute must be considered as one is shown by the language of the statute itself. Paragraph 24 reads as follows (italics ours):

> "24. In case for any reason any paragraph or any provision of this act shall be questioned in any court and shall be held to be unconstitutional or invalid, the same shall not be held to affect any other paragraph or provision of this act, *except that sections I and II are hereby declared to be inseparable,* and if either section be declared void or inoperative in an essential part, so that the whole of such section must fall, the other section shall fall with it and not stand alone. Section I of this act shall not apply in cases where Section II becomes operative in accordance with the provisions thereof, but shall apply in all other cases and in such cases shall be in extension of the common law."

The inseparable union between sections I and II is indicated by the decision of the New Jersey Supreme Court in the *Sexton* case, *supra* (affirmed without further opinion, so far as this point is concerned, by the New Jersey Court of Errors and Appeals in 86 N. J. Law, 701) wherein it is said:

> "The proceedings under review are not under Section I of the act. But, Sections 1 and

> 2 providing two entirely different schemes—one regulative of the common law, and the other purely the creature of statute—are so interwoven and constitute so completely one single plan that it is unlikely that if section 1 is bad, the legislature intended that section 2 should stand. Indeed, the contrary is expressly provided in paragraph 24 of the act. It is therefore necessary to consider the objections raised, as they may be applicable to either section."

If Sections I and II are "inseparable," how is it possible to permit recovery of compensation under Section II in interstate cases wherein the employer cannot elect to avail himself of the provisions of section I because the moment he attempts to do so by serving the notice provided in Section II he finds that he is operating under the Federal law. The result of the construction of the State and Federal statutes adopted by the New Jersey Court of Errors and Appeals in the present case is that in this respect among others it deprives the carrier of the equal protection of the laws and deprives it of its property without due process of law, contrary to the Fourteenth Amendment. For further discussion of this, see Point III.

In this connection we call particular attention to the provision of paragraph 8 of section II, which provides that the agreement whereby the provisions of section II are accepted "shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of section II of this act."

The intent of this part of the statute obviously is, in cases coming under section II, to prohibit a

recovery under the form of liability regulated in section I. But the latter is the same as the common law liability declared and limited by the Federal statute; paragraph 8, therefore, requires a surrender of the common law rights declared and limited by the Federal statute.

Turning to Section 5 of the Federal Act, we find that Congress on the other hand has declared "that any *contract*, rule regulation *or device whatsoever*, the purpose and intent of which shall be to enable any common carrier to exempt itself from *any* liability prescribed by this act, shall to that extent be void." If paragraph 8 of Section II of the Compensation Act, which we have quoted above, is not designed to enable an employer to exempt itself from every liability except that set forth in that section, it is hard to conceive of a provision which could do so.

This Court sustained the constitutionality of the Federal Act in so far as Section 5 of said act is concerned in the case of *Phila., etc., R.R. Co. v. Schubert*, 224 U. S. 603, 56 L. Ed. 911. The court therein said (page 601):

> "The evident purpose of Congress was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act.' It includes *every variety* of agreement or arrangement of this nature; and stipulations contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms."

The two methods are thus in direct conflict

upon the question of the surrender of all other forms of recompense for injuries, and in such case the State enactment must give way to the Federal.

Paragraph 8 of Section II of the State Act, so far as it is applicable to intersate cases, is therefore void, both because it is in conflict with Section 5 of the Federal Act, and also because such a provision is expressly declared to be void by said Section 5.

Paragraph 8 is an essential part of the provisions of Section II of the New Jersey Act; as it is void because in conflict with Section 5 of the Federal Act then for this reason Section II of the State Act should be held inapplicable to interstate cases.

An illustration of the inconsistencies between the New Jersey statute and section 5 of the Federal statute is found in the case of *West Jersey Trust Co., Admr., v. Phila. & R. Ry. Co.*, 95 Atl., 753, wherein the New Jersey Supreme Court held that the New Jersey statute superseded a previous arrangement between the carrier and the injured employe, for his admission into a railroad relief association. It was held that a release by the employe in his lifetime contained in his application for such admission did not operate as a bar to proceedings by the representative of the deceased employe brought under the compensation act. Under Section 5 of the Federal Act, though such a release would not operate as a bar yet the carrier would be entitled to set-off any sum it had contributed to such relief association—a privilege to which it is not entitled under the New Jersey statute.

The New Jersey Court of Errors and Appeals bases its decision in the present case upon the

theory that the contract which is implied between the parties by paragraph 9 of the New Jersey statute may be limited to non-negligent accidents. This limitation necessarily inheres in the decision because the contract is said to be applicable only to cases of non-negligent accidents; so far as negligent injuries are concerned the Federal statute applies and controls. But the New Jersey statute expressly covers all injuries "without regard to the negligence of the employer," and therefore the decision under review in the present case practically amounts to an amendment of the New Jersey statute by striking therefrom the important economic principle by which all compensation statutes are sought to be justified, namely, that industrial accidents should be considered a part of the running expenses of the employers' business and should be compensated without regard to negligence.

> "The industry itself was the primal cause of the injury and, as such, should be made to bear its burdens." (Opinion of Supreme Court of Washington construing the Compensation Act of that State in *Peet v. Mills*, 76 Wash., 437; 136 Pac., 685; approved by this Court in *Northern Pac. Ry. Co. v. Meese*, opinion filed Jan. 17, 1916.).

We therefore submit that the decisions of this court, the necessary implications from the Federal statute itself, the message of the President and the Reports of Committees concerning it and the practical impossibility of concurrent operation of the two statutes in interstate cases due to the numerous conflicts and inconsistencies between them, all show that it was the purpose of Congress to cover the entire field of the regulation of the liability of interstate carriers to their employes while employed in interstate commerce.

POINT III.

The New Jersey Statute as construed by the Court of Errors and Appeals of that State in the present cause violates the fourteenth amendment of the Federal Constitution in that it denies to the plaintiff-in-error the equal protection of the laws and deprives it of its property without due process of law.

We have attempted to show under Point II that the decision of the Court of Errors and Appeals of New Jersey holding that compensation may be made under the State law in the case of an accident resulting without negligence is erroneous. As bearing upon this contention, and in support of the argument in behalf of the plaintiff-in-error, we now further submit that if such construction be adopted the necessary conclusion is that the New Jersey statute is unconstitutional as violative of the Fourteenth Amendment. We do not claim in the present case that the New Jersey statute is unconstitutional for this reason, because we think that the construction thereof adopted by the New Jersey Court of Errors and Appeals is erroneous, but we do urge that the statute *as construed* violates the Fourteenth Amendment. It is elementary that whenever possible statutes will be so construed as to harmonize with constitutional provisions. 8 Cyc., page 802 and cases cited. If, therefore, the construction of the New Jersey statute adopted by the New Jersey Court violates the Federal Constitution, that fact is a strong additional reason for adopting some other construction, if possible, which does not violate the Constitution.

A. Denial of Equal Protection.

The classification of corporations according to their business and subjecting them to different rules of liability, dependent upon the nature of the business, does not deny the equal protection of the laws. 8 Cyc. 1061, 2.

Statutes may therefore be passed which are applicable to railroads as distinguished from other employers. Examples of such statutes are considered in the following, among other cases:

Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205; 32 L. Ed. 107;
Louisville & N. R. Co. v. Melton, 218 U. S. 35; 54 L. Ed., 921;
Mobile etc. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. Ed. 78;
Chicago, etc., R.R. Co. v. McGuire, 219 U. S., 549; 55 L. Ed., 328;
Chicago etc. R. Co. v. Hackett, 228 U. S. 559; 57 L. Ed. 966.

But the validity of such statutes depends upon the fact that they apply to all railroads and apply to all persons under the same conditions. The principles by which the validity of such legislation is determined are set forth as follows in the *Mackey* case, *supra* (italics ours).

> "And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, *if all persons brought under its influence are treated alike under the same conditions.* * * * Such legislation is not obnoxious to the last clause of the 14th Amendment, if *all* persons subject to it are treated alike under *similar* circumstances and conditions in *respect both of the*

privileges conferred and the liabilities imposed. * * * * The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, *and all railroad corporations* are *without distinction*, made subject to the *same* liabilities."

The construction of the New Jersey statute adopted by the New Jersey court in the present case does not classify carriers by railroads according to the *railroad* business and the hazards thereof, but according to whether the particular act of commerce in which it is engaging and in which its employe is employed at the moment of an accident is inter or intra-state. If it is intra, then compensation must be made in every case "without regard to the negligence of the employer" but if inter, then compensation must be made under the State law in those cases where there is no negligence and under the Federal law in those cases where there is negligence.

If the amount required to be paid in both inter and intra-state cases was substantially the same, and if it were determined in the same manner under both the State and the Federal statutes, possibly there would be no denial of equal protection. But as shown under Point II, subhead (F), there are important differences between the State and the Federal Acts in both of these respects.

Aside from the power of Congress to legislate as to the rights and liabilities of master and ser-

vant under the commerce clause of the Constitution, we submit there is no reasonable basis for a classification of the liability of a carrier by railroad which is made dependent solely upon the question of whether the injury or death resulted in inter, as distinguished from intra-state business.

The two classes of traffic are "interdependent" in point of movement and safety (*Illinois Central R. R. v. Behrens*, 233 U. S. 473, at page 477). The hazard does not depend upon whether the particular movement happens to be inter or intrastate. Both are equally hazardous, or either may be more so than the other, according to the circumstances of the particular operation. How, then, can there be any reasonable ground to distinguish between the two kinds of business by imposing a rule of liability in the one case different from that in the other? How can an interstate carrier be reasonably required to measure its liability by a different rule from that imposed upon an intra-state carrier?

In those cases wherein State statutes have been considered which were passed prior to the Federal legislation on this subject, the constitutionality of the statutes has been sustained on the theory that railroad employers constituted a special class due to the peculiar nature of the business. But could any one say that such statutes would have been sustained if they had attempted to prescribe one rule of liability for an interstate railroad and another for an intrastate railroad, or one rule for a railroad while it was engaging in interstate business and another rule for the same railroad while it was engaging in intrastate business, although in both cases the employes are

"working side by side" (*American Radiator Co. v. Rogge*, 86 N. J. L., 436).

Moreover, so far as concerns employes employed in interstate commerce an interstate carrier cannot *elect* under paragraph 9 of the New Jersey statute whether it will operate under Section II or Section I of that statute, because if it elects to go under Section I, that moment it comes under the Federal Act. Hence, as to such employes, an interstate carrier can elect only between Section II of the State law and the Federal statute. But the same interstate carrier, as to employes who are not employed in interstate commerce, may elect between Sections II and I, and an intrastate carrier engaging in intrastate business may make the same election.

Hence, the interstate carrier, so far as concerns employes who are working in interstate commerce, is not on an equality with other carriers in interstate commerce nor with intrastate carriers.

The results are:

1. In cases where there is no negligence the intrastate carrier pays the amount of compensation prescribed by the State Act; the interstate carrier makes similar compensation.

2. In cases where there is negligence, the intrastate carrier continues to pay under the State law. But the interstate carrier pays—not the amount which the State law fixes—but whatever amount a jury may find as damages (subject to the defence of assumption of risk in appropriate cases); and *in addition*, under the reasoning in the present case and in the decision of the New Jersey Supreme Court in the Rounsaville case, the interstate carrier also pays the

amount of compensation required by the State law; thereby resulting in a double recovery.

It therefore follows that the interstate carrier is deprived of the equal protection of the laws in that it has not the same election as the intrastate carrier and is subjected to a greater burden than the intrastate carrier.

A recent case which illustrates the foregoing argument is *Jarvis v. Daggett,* 151 Pac., 648, where the Supreme Court of the State of Washington held that to construe the Compensation Act of that State to be applicable to cases falling within the admiralty jurisdiction would deprive the employer (the vessel owner) of the equal protection of the law because under such construction of the statute such employer would have the burden of paying the premiums required by the statute, but at the same time would not be relieved from liability in admiralty.

Still another inequality which results from the construction of the New Jersey statute by the Court of Errors and Appeals in the present case is found in the difference between the State law and the Federal law with respect to contributions on the part of the carrier to insurance or relief benefits. Under section 5 of the Federal law the carrier may set-off any sum it has contributed or paid to any insurance or relief fund, but under the New Jersey statute the carrier does not get the benefit of such contribution or payment. See *West Jersey Trust Co., Admr., v. Phila. & R. Ry. Co.,* 95 Atl. 753.

This inequality exists not only as between interstate carriers and intrastate carriers, but also as between interstate cases of accidents resulting from negligence and interstate cases resulting with-

out negligence; in those interstate cases that result from negligence the carrier has the benefit of the set-off permitted under section 5 of the Federal Act, because admittedly the Federal Act applies to such cases—but in interstate cases of accidents resulting without negligence the carrier does not have the benefit of such set-off, because under the New Jersey statute the employe may recover the full amount specified in the schedules of the statute without allowance for contributions or payments to insurance or relief benefits. But it is a matter of common knowledge that payments to injured employes or their representatives or dependents from the insurance or relief benefits are made without reference to the question of whether the accident resulted from negligence. See *Staley v. Illinois Central R. Co.*, 109 N. E., 342, at p. 348.

B. Deprivation of property without due process.

In the case of *Sexton v. Newark District Telegraph Co., supra*, wherein the constitutionality of the present New Jersey statute was sustained as against the constitutional objections therein urged, it was said that the New Jersey statute did not take the property of the defendant without "due process" because the employer had the right to elect between section II, providing for a definite payment of compensation irrespective of negligence, and section I, removing certain common law defenses; and the statute was distinguished from that declared unconstitutional in the case of *Ives v. Southern Buffalo Ry. Co.*, 201 N. Y. 271, on the ground that the statute in the latter case was compulsory. See 84 N. J. Law, at p. 100.

Assuming this to be a sound distinction, the question still remains whether the New Jersey

statute is valid in a case like the present where the interstate carrier employer is deprived of this election between Section II and Section I of the New Jersey statute, and is in effect prevented from making the choice specified in paragraph 9 of the New Jersey Act by reason of the fact that if it serves notice under that paragraph it then operates, not under section I, but under the Federal statute. The very foundation of the decision in the *Sexton* case is that the employer has an election between sections II and I of the New Jersey statute, but if the election no longer exists then the reasoning upon which the *Sexton* case is founded fails. The interstate employer may prefer to operate under section I rather than be obliged to pay the compensation specified in section II. But if it has not the right to make such election, due to the fact that as soon as it gives notice under section II it comes under the Federal Act, then we submit it is deprived of its property without due process.

It is no answer to say that the interstate carrier, if it gives notice under section II, is not harmed because as a result of such notice it is obliged to operate under the Federal Act instead of under section I, of the New Jersey Act, for the reason that the Federal Act is in certain respects less burdensome than said section I. The question is not whether the Federal Act does or does not impose as great a burden upon the interstate carrier, as does said Section I, but rather whether the employer is deprived of its election to operate under Section I, if it wants so to do. Moreover, in some cases, the Federal Act may be more onerous than Section I of the New Jersey Act. For example, under the former, contributory negligence is in all

cases only a partial defense, whereas under the latter, contributory negligence, in the sense of willful" negligence, as defined in the statute, is a complete defense.

There is still another aspect in which we submit the carrier does not have due process. If the theory of the Court of Errors and Appeals in the present case is sound, that the rights of the parties depend upon the fact of the existence of a contract "presumed" pursuant to paragraph 9 of the New Jersey statute, and that an action by the employe based upon such contract is distinct from an action *ex delicto* based upon negligence, then an injured employe has the right to receive compensation under section II in all cases "without regard to the negligence of the employer"; and in addition, in a case resulting from negligence, has the right to whatever damages a jury may give in proceedings under the Federal Act. This results in a situation similar to that arising under the New York statute considered in the *Ives* case, *supra*. The constitutional objection declared in that case was that the statute made the employer liable to make compensation, irrespective of negligence, while at the same time continuing his liability at the election of the employe for injuries resulting from negligence as at common law.

On this same reasoning the compensation act of the State of Montana was declared void in the case of *Cunningham v. Northwestern Improvement Co.*, 44 Mont., 180; 119 Pac., 554. The statute under consideration in that case required the employer to make certain payments into a state insurance fund but left it liable to a suit at common law.

If it be said that the interstate carrier has the option to avoid the danger of a double recovery in cases of negligence by serving notice under paragraph 9 of the New Jersey statute, the answer is that the *only* way such employer *can* avoid such danger is by serving such notice; and it is therefore in effect *compelled* to serve the notice if it would avoid the danger, and is therefor deprived of its election to operate under section II of the state statute, if it so desires.

If it be said, as suggested in the *Rounsaville* case, *supra,* that paragraph 8 of the New Jersey statute prevents such double recovery, the answer is that such provision conflicts with section 5 of the Federal Act and is therefore unenforceable in interstate cases. (See Point II (F), (4), page 76.)

POINT IV.

The New Jersey Statute, as construed by the Court of Errors and Appeals of that State in the present cause, is an unconstitutional regulation of and an interference with interstate commerce.

Under the construction of the New Jersey statute, as adopted by the New Jersey Court of Errors and Appeals in the present case, a common carrier by railroad, engaging in interstate commerce, may be compelled to make compensation to its employes, employed by it in such commerce, in all cases of accidents resulting without negligence on its part or on the part of any of its officers, agents or employes—the amount of the compensation to be determined in accordance with

the schedule and precedure prescribed by section II of the New Jersey statute.

The Federal statute of 1908 was sustained as a regulation by Congress of interstate commerce on the ground that Congress had the power to regulate the relations of interstate carriers and their employes, and that the regulation of such relations had a substantial connection with interstate commerce.

But the State of New Jersey now says that *it* will undertake to regulate such relations and that interstate carrier employers by railroad doing business within the State so far as concerns accidents resulting without negligence are controlled by the provisions of the State Compensation Act.

This argument does not depend upon the claim set forth under Point II that Congress has in fact regulated the whole subject matter of the liability of carriers by railroad to their employes in interstate cases, but is entirely aside from that question. Let us assume for the moment that Congress had expressly provided in the statute of 1908 that the application of the statute should be limited to cases of accidents resulting from negligence, and that in cases of accidents resulting without negligence the several states might regulate the relations between an interstate carrier and its employes. Even under such circumstances, we submit that the New Jersey statute, as construed in the present case, would be invalid as a regulation of and an interference with interstate commerce. The question of what action on the part of a state amounts to such a regulation of interstate commerce as to be an unconstitutional interference therewith has been considered in numerous cases. It is unnecessary to cite them at length. The cases to date are

collated and classified in the *Minnesota Rate Cases*, 230 U. S. 352, at pp. 400-411; (57 L. Ed. 1511).

The New Jersey statute expressly provides that section I thereof shall not apply in cases where section II becomes operative in accordance with the provisions thereof, but shall apply in all other cases (paragraph 24). This, of course means that every railroad in the State must carry on business under the one or the other of these two sections unless the Federal statute of 1908 be construed as superseding the New Jersey statute in *all* interstate cases. But in the present case the State court says in effect that the State will regulate the liability of interstate carriers and their employes in all cases of accidents resulting without negligence. As to such cases, therefore, the business of the interstate carrier is burdened with the obligation of making compensation pursuant to the terms of section II of the New Jersey statute.

The decision under review, if sustained, leads to endless inconsistencies and embarrassments.

Thus, the defendant in the present case, operates in the States of New York, New Jersey, Pennsylvania, Ohio, Indiana and Illinois. In New Jersey, under the present decision, it must make compensation under the New Jersey Compensation Act in all cases arising in New Jersey without negligence.

In the State of New York, according to the decision in the case of *Winfield v. New York Central R. R. supra*, it must make compensation under the terms of the New York statute in cases arising without negligence.

In Pennsylvania, Indiana and Ohio compensa-

tion acts are in effect but the question of their application to interstate accidents resulting without negligence has not as yet been decided.

In Illinois, on the other hand, in the case of *Staley v. Illinois Central R. R. supra.*, it has been decided that the compensation act of that State does not apply to *any* case (whether caused by negligence or otherwise) of an employe injured while engaged in interstate commerce.

We therefore have the peculiar situation where the defendant in two states is obliged to make compensation in interstate cases arising without negligence; in one State it is not obliged to make compensation in such cases, and in three other States it does not yet know what it is obliged to do in order to conform to the law.

The situation is like that in the case of *South Covington Ry. v. Covington*, 235 U. S. 537; 59 L. Ed. 350 where, in setting aside part of the provisions of an ordinance regulating street cars running between Covington, Kentucky and Cincinnati, Ohio, the court said:

> "If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall v. DeCuir*, 95 U. S. 485, 489, 'commerce cannot flourish in the midst of such embarrassments.'
>
> "We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of

> Federal regulation does not give the power to the State to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

So, in the present case, an employe in charge of a train running, let us say, between New York and Chicago, if he is injured in New York or New Jersey, without negligence, may compel his employer to make compensation according to the appropriate state statute, but if the accident happens after he has crossed the boundary line of the State of Illinois the carrier is not bound to make compensation.

The situation is similar to that described in the case of *Schuede v. Zenith S.S. Co.*, 216 Fed., 566, where it was held that the Ohio Employers' Liability Act did not apply to a maritime contract of employment. We quote therefrom as follows:

> "The plaintiff proceeds on the theory that the law of Ohio applies against the Minnesota corporation, and the Ohio jurisdiction attaches in the present case, because the accident happened in an Ohio tributary to the Lakes. There may be some doubt whether it is not the law of the Saxona's home port and the jurisdiction of Minnesota which control, if there is no Federal law applying (*Thompson Towing & Wrecking Association v. McGregor*, 207 Fed. 209; 124 C. C. A. 479); but, assuming that plaintiff's contention is right, then two consequences follow his construction of the saving clauses in section 24 and 256 of the Judicial Code, both provocative of inconvenience, inequality, inconsistency and almost absurdity:
>
> "First. The defendant, for torts on contract committed by it of precisely the same character, and upon servants of precisely the

same class, would be subject to as many varieties of responsibility, and would be compelled to vary its defenses as the laws pertaining to the incidents of service differ in the several places of accident. There are eight state jurisdiction bordering upon the waters in which the Saxona plies, and it is conceivable that eight seamen of the same class each might meet in his employment with an injury substantially of the same class in a port of each of such jurisdictions, each claimant enjoying a common right of recovery under the maritime law or a different right under the local law.

"Second. A seaman would enjoy the option of a uniform contractual right under the law maritime, or to vary under local laws the incidents of the contracts as he proceeds from port to port and as he had occasion to invoke such rights. In Buffalo his contract would be one thing; in Cleveland, if the Ohio law differs from that of New York, it would have another phase; to change its color again in Detroit, Milwaukee, Duluth, Chicago, and Michigan City, if the laws of their several jurisdictions, respectively, offered peculiarities. These conditions, with all their inconveniences and inequalities and unnecessary burdens, are not compelled by the language of the saving clause in question and should be avoided in construing that provision."

The difficulties arising from the attempt of the State of New Jersey to regulate interstate commerce may be readily overcome if the supreme authority of Congress in dealing with the subject matter of the liability of carriers by railroad to their employes is recognized. This was pointed out in *Adams Express Co. v. Croninger,* 226 U. S. 491, at p. 505 (57 L. Ed. 314), where the court said:

"Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in *Southern Pacific Co. v. Crenshaw*, 5 Ga. App. 675, 687, 63 S. E. Rep. 865, where that court said:

" 'Some States allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them.'

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his

power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."

POINT V.

For these reasons the judgment of the Court of Errors and Appeals of the State of New Jersey should be reversed and the judgment of the Supreme Court of that State affirmed.

GILBERT COLLINS,
GEO. S. HOBART,
Counsel for Plaintiff-in-Error.

Appendix.

NEW JERSEY SUPREME COURT.

June Term, 1915.

EMMA W. HOPKINS, *Prosecutor,* *vs.* COURT OF COMMON PLEAS of the County of Union, et al., *Defendants.*	On Certiorari.

Argued June 1, 1915.
Decided June 28, 1915.

ABE J. DAVID, ESQ.,
For Prosecutor.

JOHN F. REGER, ESQ.,
For Defendant, Port Reading Railroad Co.

Before Justices GARRISON, TRENCHARD & BLACK.

Per Curiam:

The petitioner, Emma W. Hopkins, filed her petition in the Union County Court of Common Pleas, praying that compensation be awarded to her for the death of her husband Raymond G. Hopkins, under the Workmen's Compensation Act of New Jersey. It is admitted that Raymond G. Hopkins, the petitioner's husband, was on the eighth day of April, 1914, at Port Reading in this State, employed by the defendant, the Port Reading Railroad Company; that he was run over and killed by an engine of the defendant company. The defense was that the defendant company was a

common carrier engaged in interstate commerce and that at the time of receiving the injuries causing his death, he was assisting in the movement of cars, which were being made into a train engaged in interstate commerce, that by reason thereof the said Raymond G. Hopkins and the defendant company were not bound by nor subject to the New Jersey statute, but were bound by and subject to the provisions of an act of the United States Congress, relating to the liability of common carriers to their employes. The trial judge took this view of the facts and rendered judgment for the respondent, dismissing the petitioner's petition.

The essential facts are that the deceased was assisting the crew of engine No. 1409, in which he was employed as a brakeman, in the movement of ten empty coal cars. The crew is engaged in making up a train of empty coal cars for a return trip to the mines of Pennsylvania, which train was being made up in that part of the yard known as South Yard. The crew brought the ten empty cars from the old yard and were about to shunt them into the South Yard. The track was blocked by Engine No. 1504 which had just pulled in from Bridgeport, Penn. Another crew of engine No. 787 was shifting some of these cars. Hopkins, during the movement of the ten cars, had alighted and when last seen alive was walking toward these cars, which his crew was handling and which had then come to a stop. He was run over by engine No. 787 drawing the caboose and seven loaded cars which had been cut off from the Bridgeport trains, a maneuver incidental to the make-up of the interstate train drawn by engine No. 1409.

Under this state of facts we think the ruling of the trial judge was correct. In the case of *Illinois Central R.R. Co. v. Behrens,* 233 U. S., 473, 478, Mr. Justice Van Deventer speaking for the United States Court, said, "The true test is the nature of the work being done at the time of the injury." Tested by that rule, the judgment of the Common Pleas Court should be affirmed and it is hereby affirmed.

NEW JERSEY SUPREME COURT.

June Term, 1915.

REGINA LINCKS, Administratrix of HENRY W. LINCKS, deceased, *Petitioner-Defendant,* *vs.* ERIE RAILROAD COMPANY, *Respondent-Prosecutor.*	On Certiorari.

Argued June 3, 1915; Decided July 6th, 1915.

FRANK G. TURNER, Esq.,
For Petitioner-Defendant.

MESSRS. COLLINS & CORBIN,
For Respondent-Prosecutor.

Before Justices GARRISON, TRENCHARD & BLACK.

Per Curiam:

The petitioner, Regina Lincks, filed a petition in the Hudson County Court of Common Pleas, stating that Henry W. Lincks was her husband; that he was killed on the Twenty-fourth day of September, 1914, while in the employ of the Erie Railroad Company at the terminal yards in Jersey City; his employment was that of an engine tender or laborer; that is, he filled cab lights, filled the steam guage lights, the water glass lights and the red and white lights and cleaned them with a piece of waste; that at the time of the accident he was engaged in his duties, and while alighting from an engine he stepped on the adjacent track and was struck by an engine traveling in an op-

posite direction. The petitioner asked that she be awarded compensation for his death. The principal business done by the respondent in passenger trains coming into Jersey City at the terminals yards, was the carrying of through interstate passengers between points in New York, New Jersey and New York City. There is no substantial dispute about the facts. The defense was, that at the time of the accident, the respondent was engaged in commerce between and among several states and that the legal rights of the petitioner and the respondent are determined exclusively by the Act of Congress of the United States and not by the New Jersey Workmen's Compensation Act. The Court found in favor of the petitioner and against the respondent.

We think this is error. The case falls within the decision of the United States Supreme Court, in the case of *North Carolina R. R. Co. v. Zachary*, 232 U. S., 248. Mr. Justice Pitney speaking for the Court, said that in order to bring the case within the terms of the Federal Act (Employers' Liability Act of 1908, 35 Stat. 65 c. 149) the defendant must have been at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and the injured employe must have been employed by such carrier in such commerce. When the defendant is a common carrier engaged in interstate commerce and the employe for whose injuries the suit is brought was employed by the defendant in such commerce, the Federal Employers' Liability Act of 1908 governs to the exclusion of the State statutes.

The judgment of the Hudson County Court of Common Pleas is reversed.

FILED
FEB 28 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 353

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,

against

AMY L. WINFIELD,
Defendant-in-Error.

In Error to Court of Errors and Appeals of the State of New Jersey.

BRIEF OF DEFENDANT-IN-ERROR.

HARRY LANE,
Counsel for Defendant-in-Error.

APPEAL PRINTING COMPANY, NEW YORK.

SUBJECT INDEX.

PAGE

Statement of the Case 1

Questions involved 1

The case at bar distinguished from other cases under State Compensation Acts on advanced call for October 2

Printed copy of New Jersey Workmen's Compensation Act to be submitted on the argument 3

Brief of the argument 3

I.

THE PETITIONER'S DECEDENT WAS NOT EMPLOYED BY THE DEFENDANT IN INTERSTATE COMMERCE AT THE TIME OF THE ACCIDENT WHICH CAUSED HIS DEATH 3

(a) Facts 3

(b) The burden of proving that the deceased was engaged in interstate commerce on the defendant 5

(c) The finding of the Court of Common Pleas that the deceased was not engaged in interstate commerce at the time of the accident, which caused his death, was justified 6

(1) Cases on this point 6

(2) Cases cited by counsel for the defendant where the question involved was as to whether or not the particular cases could be brought within the scope of the Federal Act distinguished from the case at bar ... 8

PAGE

(d) The finding of the Court of Common Pleas that the deceased was not engaged in interstate commerce at the time of the accident is conclusive 10

II.

THE NEW JERSEY WORKMEN'S COMPENSATION ACT APPLIES WHERE AN ACCIDENT OCCURS, WITHOUT ANY NEGLIGENCE OF THE RAILROAD COMPANY, TO A RAILROAD EMPLOYEE WHILE HE IS ACTUALLY EMPLOYED, AND THE RAILROAD IS ACTUALLY ENGAGED, IN INTERSTATE COMMERCE 12

(a) The Federal Employers' Liability Act does not apply in cases where there is no negligence on the part of the employer..... 13

(b) There is no negligence in the case at bar. 14

(c) The New Jersey Workmen's Compensation Act does not conflict with the Federal Employers' Liability Act..... 14

(1) Recovery under the New Jersey Workmen's Compensation Act in cases where negligence is proved..... 14

(2) The Federal Employers' Liability Act and Section 2 of the New Jersey Workmen's Compensation Act have no relation to each other and do not cover the same field 15

Opinion in Rounsaville case..... 16

(3) In the case at bar it is not necessary to determine whether Section One of the New Jersey Workmen's Compensation Act is in conflict with the Federal Employers' Act 20

PAGE

(4) Section 5 of Federal Act does not prevent a recovery under New Jersey statute..... 21

III.

CONSTITUTIONAL QUESTIONS..... 21

(a) There are no constitutional questions involved 21

(1) Constitutional questions not raised below 21

(2) A party to a contract cannot argue that the contract is unconstitutional..... 22

(b) The judgment in this case does not violate the Fourteenth Amendment of the Federal Constitution 23

(1) No denial of equal protection..... 23

(2) No deprivation of property without due process 23

(3) The New Jersey Statute, as construed by the Court of Errors and Appeals of New Jersey, is not an unconstitutional regulation of and interference with interstate commerce 24

(c) Double Recovery..... 26

CONCLUSION 26

ALPHABETICAL LIST OF CASES CITED.

PAGE

Cincinnati, N. O. & T. R. Co. *v.* Slade, 216 U. S., 78, 54 L. Ed., 390..... 22

Deibeikis *v.* Link Belt Co., 104 N. E., 211 (Sup. Ct. Ill.) 22

Gregutis *v.* Waclark Wire Works, 92 Atl., 354 (Sup. Ct. N. J.)..... 18

PAGE

Grand Trunk Western R. Co. *v.* Lindsay, 233 U. S., 42, 58 L. Ed., 838, 34 Sup. Ct. Rep., 581 7

Hamill *v.* Pa. R. R. Co., 94 Atl., 314 (Sup. Ct. N. J.) 13, 16

Illinois C. R. Co. *v.* Behrens, 233 U. S., 471, 58 L. Ed., 1051, 35 Sup. Ct. Rep., 473.... 7, 10

Mutual Life Ins. Co. *v.* McGraw (188 U. S., 291), note to case in 63 L. R. A., 33..... 22

North Carolina R. Co. *v.* Zachary, 232 U. S., 248, 58 L. Ed., 591, 34 Sup. Ct. Rep., 305.. 7

Romsaville *v.* C. R. Co., 94 Atl., 392 (Sup. Ct. N. J.) 13, 16, 17, 18, 19, 20

St. Louis, S. F. & T. R. Co. *v.* Seale, 229 U. S., 156, 57 L. Ed., 1129, 33 Sup. Ct. Rep., 651. 7

Seaboard Air Line R. Co. *v.* Moore, 228 U. S., 433, 57 L. Ed., 907, 33 Sup. Ct. Rep., 58... 7

Scott *v.* Payne Bros., 89 Atl., 927 (Sup. Ct. N. J.) 11

Second Employers' Liability Cases (Mondou *v.* N. Y., N. H. & H. R. Co., 223 U. S., 1, 56 L. Ed., 327, 38 L. R. A. (U. S.), 44, 32 Sup. Ct. Rep., 169 ..... 7, 25

Sexton *v.* Newark Dist. Tel. Co., 84 N. J. L., 85, 86 Atl., 451 (Sup. Ct. N. J.), affirmed 91 Atl., 1070, on opinion below..... 15, 24

St. Louis, I. M. S. R. Co. *v.* Craft, 237 U. S., 648, 59 L. Ed., 1160..... 26

Sherlock *v.* Alling, 93 U. S., 99, 23 L. Ed., 819. 25

Winfield *v.* N. Y. C. & H. R. R. Co., 153 N. Y. Supp., 499 13

West Jersey Trust Co. *v.* Phila. & Read. R. Co., 95 Atl., 753 (Sup. Ct. N. J.) 20

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 811.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,

against

AMY L. WINFIELD,
Defendant-in-Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF ON BEHALF OF AMY L. WINFIELD, DEFENDANT-IN-ERROR.

Statement of the Case.

In this brief I shall refer to the plaintiff-in-error as the defendant and to the defendant-in-error as the petitioner.

Questions Involved.

There are two questions involved:

(1) Whether or not the petitioner's decedent was employed by the defendant and actually engaged in interstate commerce at the time of the accident which caused his death.

(II) The applicability of the New Jersey Workmen's Compensation Act where an accident occurs, without any negligence on the part of the railroad company, to a railroad employe while he is actually employed, and the railroad is actually engaged, in interstate commerce.

Case at Bar Distinguished from Other Cases Under State Compensation Acts on Advance Call for Argument.

There are several appeals from awards under state compensation laws which are on the advance call for argument. I have not before me the transcripts in these cases. I know there are some from awards under the New York Compensation Act.

The New Jersey statute differs in several respects from the New York Statute; so much so that it is necessary to argue this appeal separately from the appeals from the awards under the New York Statute.

One particular fundamental in which they differ is that the New York Statute is *compulsory* while the New Jersey Statute is *elective*. The whole theory of Section Two of the New Jersey Statute is that of a contractual relation. It is exactly the same as though its provisions were specifically incorporated in a written contract of employment signed and sealed by the employer and employee. It is as much a part of the contract as the amount of wages to be paid.

Another important difference between the two acts is that there is no section in the New Jersey Statute similar to Section 114 of the New York Act. The two statutes are before this Court for examination and the essential details in which they differ can be readily discerned.

Printed Copy of New Jersey Workmen's Compensation Act to be Submitted on the Argument.

Counsel for defendant in their brief state that they will submit on the printed argument a printed copy of the New Jersey Statute for the use of the Court. In this brief I have therefore referred to the act by section number without quoting in full the language of the particular section.

BRIEF OF THE ARGUMENT.

I.

The petitioner's decedent was not employed by the defendant in interstate commerce at the time of the accident which caused his death.

A.

Facts.

David R. Winfield, the deceased, on October 23rd, 1914, was killed in the Erie Railroad Company yards at Jersey City. He had been employed by the Railroad Company for about forty years prior to his death, and since 1880 had been employed as an engineer and was detailed on a switching or drilling engine in the Croxton Yards of the Erie Railroad Company. At the time of his death he had placed his engine on the ash-pit, which was the place he was directed to leave the engine for the night. It was necessary for him to walk across the track on his way home, and while doing so he was killed.

The sole defense contained in the answer of the defendant which was raised at the trial, is contained in the seventh paragraph, which paragraph

sets forth that the deceased at the time of the accident was engaged in interstate commerce and that the Federal Act exclusively governs the present case, and that therefore the Hudson County Court of Common Pleas had no jurisdiction to entertain the petition in this matter or to make any order thereunder (Transcript, pp. 7-8).

It appears that the duties of the deceased never took him outside of the State of New Jersey; that his duties consisted in drilling or moving with his engine, freight cars which contained interstate commerce between various States of the Union and freight cars which contained intrastate commerce only between points within the State of New Jersey; that he would also move empty cars. At times he would be moving interstate commerce and at other times intrastate commerce, at other times he would be moving cars containing freight of both kinds, at other times he would be moving empty cars, and at other times he would be simply moving his engine in the course of his duties. His duties were the drilling of freight cars from the terminal to what is known as the "transfer station" and to do any necessary drilling and moving of the cars to enable them to be unloaded and reloaded, etc.; he would also move such empty cars as was necessary to carry out his general work of this character.

The last act which he did on the day in question before taking his engine to the ash-pit, was the sorting of cars, which had been removed, from the transfer platform, where the freight was sorted, so that the cars themselves would be ready to be moved on freight trains to their destination. It does not appear whether or not the last freight

car which he moved, contained interstate commerce or whether it contained solely intrastate commerce, or whether it was an empty car to be used either as part of interstate commerce or part of intrastate commerce (Transcript, pp. 9, 10, 11, 12, 13).

However, this would make no particular difference, for he was entirely finished for the day and had run his engine to the ash-pit and left it there for the night.

In the morning, when he would have returned his first duties might have been to move a car or cars containing interstate commerce only, or to move a car or cars, which contained intrastate commerce only, or to move cars of both classes or to drill empty cars.

Under the Behrens' case in this Court, 233 U. S., 471, 58 L. Ed., 1051, even though there was evidence to show that the first work he would have done in the morning would have been a part of interstate commerce, still recovery could be had under the New Jersey Statute.

The Trial Court found that the deceased at the time of his death was not engaged in interstate commerce (Transcript, p. 10, Par. 7).

B.

The burden of proving that the deceased was engaged in interstate commerce was on the defendant.

The defendant's answer is divided into two parts: The first six paragraphs being in direct answer to the petition and the seventh paragraph sets up a separate and distinct affirmative defense. *In this paragraph the defendant raises the only*

two questions which are involved in this case. (See "Questions Involved" in this Brief.) Paragraph Seven is prefaced with the words "Further answering," and the matters therein contained are clearly separate and apart from the preceding paragraph (Transcript, pp. 7-8).

There is no proof in the case that the deceased was actually engaged in interstate commerce at the time of the accident, which caused his death.

The defendant did not sustain the burden of proof.

The finding of the Trial Court that the deceased was not engaged in interstate commerce at the time of the accident, which caused his death, was justified.

C.

The finding of the Court of Common Pleas that the deceased was not engaged in interstate commerce at the time of the accident which caused his death, was justified.

I have argued on the facts under subheads "A" and "B."

This Court has laid down in several cases the proper test to be applied to determine whether or not a particular case can be held to be an engagement in interstate commerce so as to bring it within the Federal Employer's Liability Act. Applying this test, the Court of Common Pleas was justified in its finding that the deceased was not engaged in interstate commerce at the time of the accident. Paricularly is this true when the burden of proving this is on the defendant.

(1) Cases on this point:

The true test laid down by this Court is:

> "Is the work in question a part of the interstate commerce in which the carrier is engaged?"

Second Employer's Liability Cases, Mondou *v.* N. Y., N. H. & H. R. Co., 223 U. S., 1, 56 L. Ed., 327, 38 L. R. A. (U. S.), 44, 32 Sup. Ct. Rep., 169.

Seaboard Air Line R. Co. *v.* Moore, 228 U. S., 433, 57 L. Ed., 907, 33 Sup. Ct. Rep., 58.

St. Louis S. F. & T. R. Co. *v.* Seale, 229 U. S., 156, 57 L. Ed., 1129, 33 Sup. Ct. Rep., 651.

North Carolina R. Co. *v.* Zachary, 232 U. S., 248, 58 L. Ed., 591, 34 Sup. Ct. Rep., 305.

Grand Trunk Western R. Co. *v.* Lindsay, 233 U. S., 42, 58 L. Ed., 838, 34 Sup. Ct. Rep., 581.

Illinois C. R. Co. *v.* Behrens, 233 U. S., 471, 58 L. Ed., 1051, 35 Sup. Ct. Rep., 473.

The Trial Court had the Zachary case and the Behrens case particularly before it. In the Behrens case, Mr. Justice Van Deventer, delivering the opinion in this Court, says, on page 478:

> "Giving to the words, 'suffering injury while he is employed by such carrier in such commerce,' their natural meaning as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. The Act was so construed in Pedersen *v.* Delaware L. W. R. Co., 229, U. S., 146, 57 L. Ed.,

1125, 33 Sup. Ct. Rep., 648. 3 N. C. C. A., 779. It was there said (p. 150):

"'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce.'

"Again (p. 152): 'The true test is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases" (foregoing cases cited).

"Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death was not within the statute. That he was expected, upon the completion of said task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.

"The question is accordingly answered in the negative."

(2) Cases cited by counsel for the defendant where the question involved was as to whether or not the particular cases could be brought within the scope of the Federal Act distinguished from the case at bar.

The cases cited by counsel for the defendant are all on the question as to whether or not the particular cases could have been brought within the scope of the Federal Employer's Liability Act.

The case at bar is brought primarily for a recovery under the New Jersey Workmen's Compensation Act. The defendant sets up that the deceased was engaged in interstate commerce and

therefore the New Jersey Act did not apply. This is an affirmative defense and the burden of proof is on the defendant. It has not sustained that burden. The proof is that the duties of the deceased were threefold; one an engagement in interstate commerce, two, an engagement in intrastate commerce, and, three, an engagement in both interstate commerce and intrastate commerce at the same time. There is not one scintilla of proof in the case that at the particular time the accident occurred, the deceased was either actually engaged in interstate commerce or engaged in both interstate and intrastate commerce. There is not one scintilla of proof that the last work which the deceased had done was the moving of cars engaged in either interstate commerce or in both interstate commerce and intrastate commerce. There is not one scintilla of proof that the next work which the deceased would do would be either an engaging in interstate commerce or in both interstate and intrastate commerce.

That the accident occurred while the deceased was in the performance of his duties was admitted both by the answer and on the trial (p. 5 and p. 11). This is as far as the proof goes. It does not show that at the particular time of the accident the deceased was actually engaged in either interstate commerce or both interstate commerce and intrastate commerce. The defendant has therefore not sustained the burden of proof.

It is admitted that the defendant was engaged at times in interstate commerce; at other times in intrastate commerce; and at other times in both.

That an employee of such a railroad may at times be engaged in interstate commerce and at other times in intrastate commerce is well recognized.

Illinois Central Railroad Company *v.* Behrens, 233 U. S., 473.

The cases all hold that in such a case the accident must occur while the employee is actually engaged in interstate commerce [see cases cited under (1), Subhead "C," *supra*].

D.

The finding of the Court of Common Pleas that the deceased was not engaged in interstate commerce at the time of the accident is conclusive.

Section 2, Paragraph 18 of New Jersey Workmen's Compensation Act, reads as follows:

> "In case of a dispute over, or failure to agree upon, a claim for compensation between employer and employee, or the dependents of the employee, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schelule herein provided, to the Judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case; or where there is more than one Judge of said Court, then to either or any of said Judges of such Court, which Judge is hereby authorized to hear and determine such dispute in a summary manner, and his decision as to all questions of fact shall be conclusive and binding."

If the question is a question of law and not of fact then the Supreme Court, acting simply as an Appellate Court, reviews the question of law. There is no question but that there is an appeal from the New Jersey Supreme Court to the Court of Errors and Appeals on all questions of law. Therefore if this question be a question of law, the

petitioner has the right to have the Court of Errors and Appeals of New Jersey pass upon it. In the opinion of the Court of Errors and Appeals the Court says:

> "We do not find it necessary to determine whether the appellant's decedent came to his death while employed by the defendant in interstate commerce as the Supreme Court held, or while employed in intrastate commerce as was found by the Court of Common Pleas, but will assume, for the purpose of deciding this appeal, that the conclusion of the Supreme Court as to the character of his employment was justified by the facts proved (Transcript, p. 18). The fact remains that the judgment of the Supreme Court was reversed and the judgment of the Court of Common Pleas was affirmed" (Transcript, Opinion, p. 19; Rule for Judgment, p. 20).

So far as the record shows, if the question is one of fact, the judgment of the Common Pleas Court is conclusive, and if it is one of law, the judgment of the Common Pleas Court on this question is either affirmed (the judgment of the Supreme Court having been reversed) or the petitioner is entitled to have the question passed upon by the Court of Errors and Appeals of New Jersey, or this Court may determine it.

The function of the New Jersey Supreme Court is concisely stated by Mr. Justice Swayze in the case of Scott *v.* Payne Bros., 89 Atl., 927. On page 928 the Court says:

> "We find no legal error in the conclusions of the Trial Judge as to the measure of damage. The medical evidence was conflicting and that for the defendant is quite persuasive, but that Judge had the right to attribute greater weight to the evidence for the plaintiff. We

cannot reverse merely because we might take a different view. The Workmen's Compensation Act, Section 11, Pl. 18, is a later enactment than the provisions of Section 11 of the Certiorari Act (1 Comp. St., 1910, p. 405) to which the prosecutor appeals, and while we cannot be deprived of our right to inquire into questions of fact where necessary to the exercise of our jurisdiction by certiorari over inferior tribunals (Lighthipe *v.* Orange, 75 N. J. Law, 365, 368; 68 Atl., 120), the present case is rather one where the writ of certiorari is in effect a writ of error. The Workmen's Compensation Act provides in Section 11 an elective scheme to which neither employer nor employee are obliged to assent. If they do assent, whether expressly or by the implication of the State, they assent to the whole scheme; a part of that scheme is that the decision of the Trial Judge as to all questions of fact shall be conclusive and binding; in effect, the agreement is that the compensation shall be such as the Trial Judge shall determine, subject to the review by this Court of questions of law. The evidence permitted the finding that the injury would last for 104 weeks. We find no legal error in this."

II.

The New Jersey Workmen's Compensation Act applies where an accident occurs, without any negligence of the Railroad Company, to a railroad employee while he is actually employed, and the railroad is actually engaged, in interstate commerce.

We are dealing particularly with the contract which arose in the employment of the deceased under Section 2 of the Act.

A.

The Federal Employers' Liability Act does not apply in cases where there is no negligence on the part of the employer.

The title of the act is as follows:

> "An act relating to the liability of common carriers by railroad to their employees in *certain cases.*"

To ascertain in what cases the Act applies, it is therefore necessary to read the statute. Section One of the statute specifically sets forth the particular cases in which the Act applies. A reading of this section will demonstrate that there is no liability "without negligence." *To sustain an action under the act it is necessary for negligence to be both pleaded and proved.*

In the case of Rounsaville *v.* The Central Railroad Company, 94 Atl., 392, it was held that:

> "The Federal Liability Act is an Act, as its name imports, to regulate the liability of employers and, as its body shows, is applicable only to liability in tort for negligence."

So held in Hamill *v.* Pennsylvania R. Co. (Sup. Ct. of N. J., June 4, 1915), 94 Atl., 314.

In the case of James Winfield *v.* New York Cent. & H. R. R. Co., 153 N. Y. Supp., 499, the Court arrives at the conclusion that the Federal Employers' Liability Act relates solely to liability on account of negligence.

On page 500, the Court says:

> "The title clearly indicates that it does not cover all the grounds of liability, but that the Act relates only to the particular cases expressly provided for in it. The provisions of

> the Act relate solely to liability on account of negligence."

This case is now on review before this Court and is No. 762, October Term, 1915. It has been advanced on the list and will be argued before this case.

B.

There is no negligence in the case at bar.

See answer of defendant (Transcript, pp. 7-8).

Determination and rule for judgment (Transcript, pp. 9-11).

Opinion, Court of Errors and Appeals (Transcript, pp. 17-19).

Brief of defendant (p. 2).

C.

The New Jersey Workmen's Compensation Act does not conflict with the Federal Employers' Liability Act.

(1) *Recovery under the New Jersey Workmen's Compensation Act in cases where negligence is proved.*

It is not necessary to determine on this appeal whether in cases where negligence is proved there can be a recovery under the New Jersey Workmen's Compensation Act. On this question the opinion of the Court of Errors and Appeals of New Jersey is as follows:

> "It may be conceded (although we are not to be considered as so holding) that in all cases where the Federal Statute accords a remedy, that statute controls to the exclusion of all State laws; but it cannot be that where

the Federal Act affords no remedy—that is, where the death of the employee occurs under such circumstances that no liability is imposed on the carrier by that Act—the widow cannot enforce a remedy which is given to her by a State Statute" (Transcript, pp. 18-19).

I do not concede that the State Statute would not apply even though this was a case in which a recovery could be had under the Federal Employers' Liability Act. It is not necessary to consider that point in the present case.

(2) *The Federal Employers' Liability Act and Section Two of the New Jersey Workmen's Compensation Act have no relation to each other and do not cover the same field.*

The Federal Employers' Liability Act applies only to liability in tort for negligence, while under New Jersey Workmen's Compensation Act liability is contractual. Under the Federal Act no new right of action is given. The Act simply takes away certain defenses, which Congress determined to be unjust. The theory of the New Jersey Workmen's Compensation Act is that a new right has been created under a specific contract between the employer and the employee. This must be so as under this contract the employer waives the right to trial by a jury; he waives any defense where an accident arises out of and in the course of the employment and he agrees to a specific schedule of compensation. The Act is not compulsory, it is elective. Sexton *v.* Newark Dist. Telegraph Co., 84 N. J. L., 85. The theory of the Federal Act is a recovery for damages. The whole theory of the New Jersey Act is compensation or a pension. The contract under the New Jersey Act is exactly the

same as any contract for insurance or a pension, which the employer might have, without any statute, entered into with his employee.

In the case of Hamill *v.* Pennsylvania Railroad Company (Supreme Court of New Jersey, June 4, 1915), 94 Atl., 314, Mr. Justice Parker, writing the opinion of the Court, says:

> "Again, the federal and state acts are not in *pari materia*. The one is an act creating liability to the employee as in tort, based upon common law negligence, or the failure to comply with some statutory provisions for the safety of the employee; the other, so far as its Section 2 is concerned, is a compensation act purely contractual in character, and requiring compensation for injury or death to be made as an incident of the mere relation and quite irrespective of any question of negligence on the part of the employer. It was manifestly intended, among other things, to give relief in just such cases as the present one, where no claim of negligence on the part of the employer could reasonably be made. As to this class of cases at least, we deem the Federal Act not to be conclusive."

I cannot more clearly present this point than to quote the opinion of Mr. Justice Swayze in the case of Rounsaville v. the Central Railroad Company (Supreme Court of New Jersey, June 7, 1915), 94 Atl., 392.

Opinion in Rounsaville Case.

SWAYZE, J.:

"The prosecutor was employed by defendant in Phillipsburgh, N. J., November 5, 1911, as a brakeman on a train running between New Jersey and Pennsylvania. His wages were

paid in this State. There is no question that the contract of service was a New Jersey contract. He was injured January 7, 1915, at Odenweiler, Pa., while on a train that had come from New Jersey. There is no question that he was engaged in interstate commerce. Two questions are to be decided:

"(1) Does the Federal Employers' Liability Act prevent the applicability of the New Jersey Workmen's Compensation Act as the Trial Judge held?

"(2) Does the New Jersey Workmen's Compensation Act apply where the accident occurs in another State?

"(1) 1. The Federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. No new right of action is given. All that is done is to take away certain defenses which had come to be thought unjust. The legal liability of the employer under the act does not depend upon the terms of the contract of service, and is neither increased nor diminished thereby. The amount of the pecuniary liability is in no way regulated or limited. The act applies only to certain classes of employers. In all these respects the Workmen's Compensation Act differs. Liability thereunder is contractual, and, while the contract liability is implied from silence, either party is at liberty to adopt or reject the statutory contract. A new right of action is given, of a character unknown to our law, at least for several centuries. The liability of the employer depends, not on any part of his own or his servants, but on whether, by act or by silence, he has adopted the statutory terms. The amount of his pecuniary liability is fixed by statute and not by the verdict of a jury. Employer and employee adopt, as a part of

their contract, a novel method of procedure, in which the liability and the compensation are determined by the Judge, instead of by a jury. And the compensation is ordinarily meant to be paid by installments, in lieu of wages, as it were, and may be changed if circumstances change. The scheme is more like a pension scheme than a liability for a breach of contract, or damages in tort. The difference between the two kinds of legislation is illustrated in our act. Section 1 is an employer's liability act similar to the act of Congress and regulates the liability in a common law action of tort. Section 2 creates and regulates the new statutory right. But for Paragraph 8 of Section 2 there might have been a double recovery, a recovery for the tort in a common-law action, and a recovery of the statutory compensation by means of the statutory procedure. Nor would that double recovery have been illegal, however unjust it might be and was in fact considered to be by the Legislature, for compensation by way of pension from the master is quite different in character from compensation by a tort-feasor, master, or third person, for a wrong not arising out of contract.

"We think it clear that the act of Congress deals with an entirely separate matter from the act of our own Legislature. No confusion would have arisen if the distinction recently pointed out by Justice Trenchard had been observed in the early days of this kind of legislation (Gregutis *v.* Waclark Wire Works, 92 Atl., 354).

In the Gregutis case the Court of Errors and Appeals held that the New Jersey statute is more properly to be referred to as the "Workmen's Compensation Act" rather than the "Employers' Liability Act." This is the distinction referred to by Mr. Justice Swayze in the Rounsaville case, *supra*.

"(2) 2. The question whether our act applies in a case where the accident happens in another State is novel. The case is the converse of American Radiator Co. *v.* Rogge, 86 N. J. Law, 436; 92 Atl., 85. Our language in the opinion seems to have been misapprehended by counsel. We do not rest the right to recover upon the theory that the question was merely one of evidence to be controlled by the law of the forum. We said that the statute stated the obligation in terms of the law of evidence, and that rules of evidence are rules of procedure, but we added that the view was technical, and that we did not rest on it alone. It would have been better to omit the word, 'alone;' but no ambiguity can arise in view of what follows. We said that the real object of the statute was to create an irrebuttable presumption; that such a presumption was in effect a rule of substantive law, and as such we dealt with it. The whole opinion shows that the case was rested upon the public policy of New Jersey, as declared in this statute. We do not question that, if the present action were brought in Pennsylvania, the Court there would be justified on the authority of the American Radiator Co. *v.* Rogge, in holding that the statutory terms of New Jersey contract ought not to prevail if in conflict with the legislation of Pennsylvania. That is not the present case. We are now dealing with the simpler question, whether a New Jersey Court will enforce a New Jersey contract, according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident to be assured, in an action on a contract of accident insurance, or the place of death of the assured, in an action on a contract of life insurance.

> "There is no proof in the pending case as to the law of Pennsylvania. If it be said that the Pennsylvania law may provide a different scheme of compensation, and that the effect of our decision may be to allow a double recovery, we can only say that questions of that kind had better be dealt with as they arise, and in the light of the exact scheme of compensation that may be involved. It is enough for the present to say that recovery of compensation in two states is no more illegal, and is not necessarily more unjust, than recovery upon two policies of accident or life insurance.
>
> "These views necessitate the reversal of this judgment and the remand of the case, to the Common Pleas for further proceedings in accordance with this opinion."

This decision was followed in West Jersey Trust Company, Admr. *v.* Philadelphia & Reading R. R., 95 Atl., 753.

(3) *In the case at bar it is not necessary to determine whether Section One of the New Jersey Workmen's Compensation Act is in conflict with the Federal Employers' Liability Act.*

It is admitted that the defendant is not affected at all by Section One of the New Jersey Workmen's Compensation Act. This is not a case where liability is attempted to be imposed by virtue of said section. This suit is brought under Section Two of the New Jersey Workmen's Compensation Act and no reference whatever is found in the case to Section One. If this proceeding had been brought under Section One, different questions entirely would be presented and whether or not a judgment under Section One would be affirmed or reversed in this Court is not relevant

or material. I have therefore refrained from making any further reply to the argument of counsel for the defendant in respect to Section One.

(4) *Section 5 of the Federal Act does not prevent a recovery under New Jersey statute.*

On the other hand, recovery under contracts, rules, regulation, device or what not is expressly recognized.

The only restriction is that any contract, the "purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void." *Not that it shall be absolutely void.*

This section has absolutely no effect and does not apply except where an attempt is made to prevent a recovery under the Federal Act.

No such purpose or attempt is shown or made in this case.

III.

Constitutional Questions.

A.

There are no constitutional questions involved.

(1) *Constitutional questions not raised below.*

Counsel for defendant has considered under Points III and IV in his brief several constitutional questions.

No constitutional questions were raised by the defendant in its answer or anywhere throughout the entire record.

Constitutional questions not raised below will not be considered.

Cincinnati, N. O. & T. R. Co. *v.* Slade, 216 U. S., 78, 54 L. Ed., 390.

Note to case of Mutual Life Ins. Co. *v.* McGrew (188 U. S., 291), in 63 L. R. A., 33.

(2) *A party to a contract cannot argue that the contract is unconstitutional.*

The defendant is a party to the contract containing the provisions of Section 2 of the State Statute.

Sexton *v.* Newark Dist. Tel. Co., 84 N. J. L., 85, 86 Atl., 451, affirmed by Court of Errors and Appeals on opinion below, 91 Atl., 1070.

Similar statute so construed:

Deibeikis *v.* Link Belt Co. (Sup. Ct., Ill.), 104 N. E., 211.

The defendant had its election. It could have elected to operate under Section 1 of the Act. It is immaterial so far as this case is concerned as to what would have been the effect if it had so elected. Having elected to operate under the provisions of Section 2, it is bound thereby and cannot argue on appeal that if it had elected to operate under Section 1, that section would have been superseded by the Federal Act.

Furthermore, this contract was not attacked below.

B.

The judgment in this case does not violate the Fourteenth Amendment of the Federal Constitution.

(1) *No denial of equal protection.*

Counsel questions the construction placed upon the New Jersey Workmen's Compensation Act by the Court of Errors and Appeals of New Jersey.

The decision goes no further than to hold that the New Jersey Statute applies in a case where there is no negligence set up or proved as in this case.

Argument of counsel for the defendant is solely to the effect that there would be a denial of equal protection in Interstate Commerce cases where there would be a right of action under the federal statute. This is shown on page 84 of counsel's brief where the argument on this point is summed up.

The New Jersey Court of Errors and Appeals in its opinion, says:

> "What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, but a contractual obligation created by Section 2 of our Workmen's Compensation Act with the consent of both employer and employee, and which exists although no negligence can be inputed to the employer. And this we consider she is entitled to do in the absence of any averment by her, or any proof offered, or any admission made by the defendant company showing that the death of her decedent resulted from defendant's negligence" (Transcript, p. 19).

(2) *No deprivation of property without due process.*

The argument under Subsection (1) applies to this point.

The constitutionality of the New Jersey Workmen's Compensation Act has been upheld in the case of Sexton *v.* Newark Dist. Telegraph Co., 84 N. J. L., 85, 86 Atl., 451, affirmed 91 Atl., 1070.

Section (2) of the New Jersey Statute is not compulsory. The provisions of that act are included in all contracts for the employment of labor in New Jersey, except where notice in writing has been served, prior to the accident as provided for in the statute.

This suit is on the theory of a specific contract. The defendant having entered into the contract certainly cannot contend that any of his constitutional rights have been violated. Furthermore, there was no such constitutional grounds raised in the answer of the defendant's counsel on the trial (Transcript, p. 7).

(3) *The New Jersey Statute, as construed by the Court of Errors and Appeals of New Jersey is not an unconstitutional regulation of and interference with Interstate Commerce.*

In the first place this question cannot be raised by the defendant because it has entered into a specific contract to comply with the provisions of Section (2) of the State's Statute.

Counsel has argued under this point that because of the variance between the statutes of the different States in which it operates, there would be endless inconsistencies and embarrassments. This ques-

tion has been repeatedly determined in this Court where it has been held that until Congress legislates, the State may pass such laws.

Congress has not legislated in respect to cases where there is no negligence.

Until Congress ligislates the States may. The subject is one which falls within the Police Power of the States in the absence of action by Congress.

Second Employers' Liability Cases, Mondou *v.* N. Y., N. H. & H. R. Co., 233 U. S., 58, 1, L. Ed., 327, and cases there cited.

Furthermore, in the case of Sherlock *v.* Alling, 93 U. S., 99, 23 L. Ed., 819, this Court held that the action of Congress as to the regulation of commerce or the liability for infringement is exclusive of State authority, but until some action is taken by Congress the legislation of a State not directed against commerce or any of its regulations, but generally to the rights and duties of citizens is legal, although it may indirectly and remotely affect the interests of foreign and interstate commerce or persons engaged in such commerce.

Argument of counsel that perhaps one rule would apply in an accident happening in New Jersey and another rule apply in an accident happening in Illinois has no bearing in the case at bar. The theory of the recovery in the present case is that the contract of employment was entered into in the State of New Jersey.

There is nothing in the judgment in the present case which creates any unconstitutional regulation of and interference with Interstate Commerce.

C.

Double Recovery.

Under the Federal Employers' Liability Act there can be a recovery on behalf of the designated beneficiary, not only for such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for his loss and suffering of the injury while he lived. Although originating from the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other.

St. Louis, I. M. S. R. Co. *v.* Craft, 237 U. S., 648; 59 L. Ed., 1160; S. C. Rep., 648.

Conclusion.

It is repectfully submitted that the judgment below should be affirmed.

Dated February 21, 1916.

HARRY LANE,
Counsel for Defendant-in-Error.

ERIE RAILROAD COMPANY *v.* WINFIELD.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 353. Argued March 1, 1916; restored to docket for reargument November 13, 1916; reargued February 1, 2, 1917.—Decided May 21, 1917.

The duty of interstate railroad carriers to make compensation for injury or death of their employees in interstate commerce is regulated uniformly and exclusively by the Federal Employers' Liability Act and is thereby confined to cases of causal negligence. *New York Central R. R. Co.* v. *Winfield, ante,* 147.

It is beyond the power of any State to interfere with the operation of the federal act, either by putting carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them through a statutory presumption. So *held* in the case of a New Jersey law containing provisions for compensation without regard to negligence, to be applicable when employer and employee elect to accept them, and presuming acceptance in the absence of a declaration to the contrary.

In leaving the yard after his day's work in switching inter- and intrastate commerce, the employee is "engaged in interstate commerce."

88 N. J. L. 619, reversed.

THE case is stated in the opinion.

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[1] The experience of the organization [Brotherhood of Locomotive Firemen and Enginemen] shows that more than 60 per cent. of all deaths and disabilities are caused by railroad accidents. W. S. Carter, Sen. Doc. 549, p. 137, 64th Cong. 1st sess.

Mr. George S. Hobart and *Mr. Gilbert Collins* for plaintiff in error.

Mr. Harry Lane for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a proceeding under a New Jersey statute, c. 95, Laws 1911, against a common carrier by railroad, engaged in both interstate and intrastate commerce, to obtain compensation for the death of one of its employees. The employee was in charge of a switch engine in the carrier's extensive yard at Croxton, New Jersey, and was switching freight cars about in the yard, especially to and from a transfer station. The cars usually contained package freight and many were moved in the course of a day's work. In some the freight was interstate, in others intrastate and in still others it was of both classes. This was true of the cars moved on the day in question. In concluding his work for that day the employee took his engine to the place where it was to remain for the night and started to leave the yard. His route lay across some of the tracks and while passing over one he was struck by an engine and received injuries from which he soon died. No causal negligence was alleged or proved and both parties assumed there was none. In these circumstances the trial judge, while not doubting that the fatal injury occurred in the course of the deceased's employment, held that he was not then employed in interstate commerce and that compensation should be made under the state statute to the widow. A judgment in her favor was entered, but was reversed by the Supreme Court of the State, which concluded that the deceased's employment at the time of the injury was in interstate commerce and that the case was controlled by the Employers' Liability Act

of Congress, which makes negligence the test of the carrier's liability or obligation. That judgment was in turn reversed by the Court of Errors and Appeals, which, although assuming "that the conclusion of the Supreme Court as to the character" of the deceased's employment at the time of the injury "was justified by the facts proved," regarded the federal act as without bearing, because affording no remedy and imposing no liability in the absence of causal negligence. 88 N. J. L. 619.

The questions presented for decision are these: First, whether the federal act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is causal negligence for which the carrier is responsible. Second, whether the facts proved sustain the conclusion that the deceased was employed in interstate commerce at the time of the injury. Third, whether by reason of the state statute the carrier became bound contractually to make compensation in this instance, even though it came within the federal act.

The first question is fully considered in *New York Central R. R. Co.* v. *Winfield*, the opinion in which has been just announced, *ante*, 147, and it suffices here to say that, for the reasons there given, we are of opinion that the federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.

The second question must be given an affirmative an-

swer. In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 260. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance.

The third question requires some notice of the New Jersey statute. It consists of two parts. One conforms to the principle which regards negligence as the basis of liability and excludes liability in the absence of negligence. In its details, however, that part differs materially from the federal act. The other conforms to a different principle which rejects negligence as a basis of liability and requires compensation to be made by the employer wherever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective" and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender "their rights to any other method, form or amount of compensation or determination thereof." Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute and, unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be presumed" that the parties "have agreed to be bound" by this part of the statute. There was no express agreement in this instance and there is no

basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of state laws. It is beyond the power of any State to interfere with the operation of that act, either by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory presumption. The third question therefore must be answered in the negative.

It follows that the Court of Errors and Appeals erred in failing to give controlling effect to the federal act.

Judgment reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent.